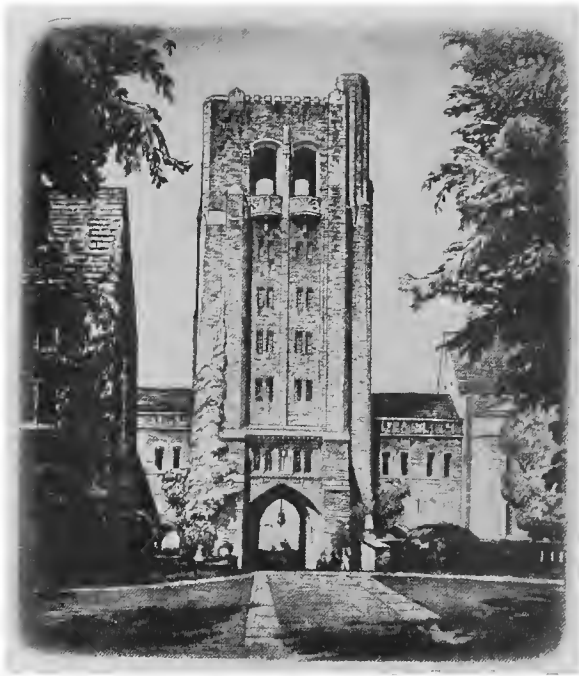




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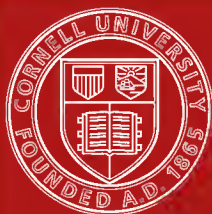
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LECTURES ON SCOTS LAW.

LECTURES ON SCOTS LAW

DELIVERED UNDER THE AUSPICES OF THE

STIRLINGSHIRE FACULTY OF SOLICITORS
AND PROCURATORS,

In FEBRUARY, MARCH, and APRIL, 1889,

BY

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AND

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THE FOLLOWING LECTURES ARE RESPECTFULLY DEDICATED TO

JAMES ROBERTON, LL.D.,

PROFESSOR OF CONVEYANCING IN THE UNIVERSITY OF GLASGOW,

DEAN OF THE FACULTY OF PROCURATORS IN GLASGOW,

AND

EX-PRESIDENT OF THE INCORPORATED SOCIETY OF LAW AGENTS OF SCOTLAND,

TO WHOSE SUGGESTION, WHEN IN OFFICE AS PRESIDENT OF

THAT SOCIETY, THEY OWE THEIR ORIGIN.

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LECTURE I.

THE LAW OF POSSESSION.

CONTENTS.—Definitions:—Law of possession of immoveable property—Its History—Comparison between Scotch and English Law—Natural and civil possession—*Bona fide* perception and consumption of fruits—Law of possession of moveable property—Original—Derivative—Modes of derivative possession—Comparison between Scotch and English Law.

THE word “possession” is often confounded with ownership in popular language. Thus, in the English translation of the Bible, we read in Matthew—“The young man went away sorrowful, for he had great possessions;” and again in Acts, “Ananias and Sapphira sold a possession.”

Yet, in a legal sense, the two words are perfectly distinct in meaning.

Possession is no doubt a most important element in our conception of ownership. It often leads up to and creates ownership, and it often accompanies ownership and flows from it; but it has a separate and independent existence, and very important consequences flow from its presence or absence, both in civil and criminal legal relations. Its importance is expressed in the two proverbs, the one of which is a free translation of the other—“*Beati sunt possidentes*,” and “Possession is eleven points of the law.”

The Scotch law of possession closely follows the Roman law, and the definitions of our institutional writers adopt almost the very words of the Digest.

Stair (II. 1. 17) defines possession as “the holding or detaining of anything by ourselves or others *for our use*.”

Erskine (II. 1. 20): “The detention of a subject with the *animus* or design in the detainer of holding it *as his own property*.”

Bell (Pr., sec. 1311): “Detention with the design or *animus* of holding the subject *as the property of the holder*.”

Observe the difference in these definitions. Stair says, "Holding for our use." Erskine and Bell, "Holding as our property." The definition of Stair is correct, for, as we shall see, there may be possession for use on a subordinate title inferior to the title of property. We therefore take Stair's definition as our text.

There are two elements involved in this definition—(1) an element of fact, the fact of detention; and (2) an element of mind, the design of holding it for one's own use.

The fact alone is not enough, for one may hold a thing as a mere custodier for another, as a servant holds for a master, or the finder of strayed cattle for the owner. The detention in this case is not presumed to be for the holder's or finder's own use, for detention with such an intention would be theft, and theft is not to be presumed.

What is the nature of the acts that amount to the detention or holding of a thing?

It is plainly not necessary in the case of a moveable subject that it should be constantly within my grasp, and in the case of land that I should be constantly treading over every part of it, or that I should be constantly able to exclude all trespass or interference.

Savigny defines this state as the condition in which not only is one's own dealing with the thing physically possible, but every other person's dealing with it is capable of being excluded. (Treatise on Possession, sec. 1).

It may here be convenient to look from the historical point of view at the mode in which the act of taking possession was performed (*a*) in the case of immoveables, and (*b*) in the case of moveables.

(*a*) *Immoveables*.—In very early times the possession of land seems to have been usually of a temporary character. The inhabitants were nomadic in their habits. While they pastured their flocks upon a piece of land or tilled it, they held physical possession of it; and when they departed thence they abandoned its possession and left it open to the next comer. To such a state of matters possession and not ownership was the proper term to apply.

When in process of time men began to settle permanently in cities and districts, possession by its permanency would ripen into ownership. One man would resist the intrusion of another

upon the piece of ground on which he had bestowed labour. He would assert a right to possess it in permanency, and even to transmit its possession to his posterity, or to dispose of his right in it to a third party for a price. We have an early instance of such a transfer in the book of Genesis (xxiii. 16)—“Abraham weighed unto Ephron the silver which he had named in the audience of the children of Heth, 400 shekels of silver, current money with the merchant. So the field of Ephron, which was in Machpelah, which was before Mamre, the field, and the cave which was therein, and all the trees that were in the field that were in all the borders thereof round about, were made sure unto Abraham for a possession in the presence of the children of Heth, before all that went in at the gate of his city. And after this Abraham buried Sarah his wife in the cave of the field of Machpelah before Mamre.” We find afterwards that Abraham himself, Isaac and Rebekah his wife, and Leah the wife of Jacob, were buried there, and that the body of Jacob was carried down from Egypt and buried there. A mosque now covers the supposed site, from which Christians are jealously excluded; and it is thought not improbable that the mummy of Jacob may be found there, when access is obtained.

Thus, these acts of possession were exercised at long intervals, Abraham and his descendants not being residents in the locality, and having no connection with it, other than the ownership of this piece of land.

This narrative illustrates the fact that the important act of possession is that which is exercised *at first*, and that less prominent acts, exercised at long intervals, will suffice to keep alive the possession when once attained. This is especially true when no contrary acts of possession are taking place. When these take place the possession becomes disturbed, and the rival claims in a rude age will be submitted to the arbitrament of force, and in a civilised age to the decision of a Court of Justice.

At the time when this transaction was settled, it is not likely that there was any written evidence of title in use. In the modern excavations on the site of ancient Babylon there have been found, as you are aware, many bricks having inscriptions in the cuneiform character. Some of these, on being deciphered by experts, have proved to be conveyances of lands and houses, with descriptions by boundaries very much after the style of

a modern conveyance. It appears also that the parties appeared before the judge in open Court, and that the transaction was there ratified, and it would no doubt be entered in the register of the Court.

There is no indication that there was any written evidence of title in Abraham's time, but when we come to the time of Jeremiah (xxxii. 9) we find that a conveyance of land was in writing, and executed by the parties and witnesses in duplicate, one copy being sealed and the other open.

The history of the mode of giving possession of land in our own country bears some resemblance to the Hebrew narrative.

When the feudal lord wished to give a grant of lands to one of his vassals, both parties appeared in presence of the *pares curiæ*, and there and then formal possession was given by the one to the other in presence of the *pares* as witnesses. At first there was no written evidence of the grant. The act of giving possession simply dwelt in the memories of those present, and its story descended from father to son. Acts of possession by cultivation, feeding of cattle, or the like, defined the boundaries and kept the memory of the transaction alive. At first such grants were at the pleasure of the lord only, then for the life of the vassal only; but in course of ages they became transmissible to the heir of the vassal.

In course of time it became the custom to reduce to writing a narrative of the act of giving possession, with the names of those present. This was called the *breve testatum*, and it was the germ of the instrument of sasine. When the feudal lord could not himself be present to give possession, he granted a mandate or precept to a deputy to act for him. This mandate developed into the charter containing the precept of sasine, or mandate to give possession.

The giving and taking of possession has always remained with us the crucial point in the transference of a right in land.

It was not the date of the first grant, but the date of the first sasine that determined the priority of right. The taking of sasine was a thing that could be managed very quietly. It was no longer done in presence of the *pares curiæ*. The parties or their representatives appeared on the ground of the lands (that was the essential point) along with a notary public and two witnesses, and there possession was given by the one to

the other, and in token of possession, and by way of giving a part of the whole, earth and stone of the lands were given by the one to the other. The presence of the notary public and witnesses was merely by way of preserving evidence of the act. This fact might remain latent, and the law did not require a daily perambulation of the lands by way of certiorating the world of the change of possession. Hence arose frequent frauds in olden times. It became common to grant double conveyances to the same piece of land, and a *bona fide* purchaser often found himself ousted by sasine having been taken before him by another purchaser. This crime was called *stellionate*, and the perpetrator of it was by the Act 1540, cap. 105, declared infamous, and to be punished at the King's pleasure.

This crime received its deathblow when public registers of land rights were instituted by the Act 1617, cap. 16, and subsequent Acts during the 17th century; and it was enacted that all instruments of sasine should be registered therein within sixty days of their dates, and should be preferable in competition according to the dates of registration.

The importance of the initial act of possession appears from the fact that, when one man acquired from another several plots of land, he required to go to each plot and go through the ceremony of taking possession separately where (1) the plots were discontinuous; or (2) held of different superiors; or (3) held by different tenures, as *blench* and *feu*; or (4) held by different titles.

The mode of taking possession of *burgage* subjects was equally significant of the stress laid upon the initial act. Take the case of an heir entering upon possession of his ancestor's property. Having satisfied the Town-Clerk of his propinquity, he attended at the house with the Bailie, the Town-Clerk as notary public, and two witnesses. He lifted the hasp of the door of the house and let himself in. He shot the bolt into the staple in token of his exclusive possession. He then came out and took instruments in the hands of the Town-Clerk. This was termed *entry by hasp and staple*, and was just a survival of the mode followed in the later Roman empire.

The perfect system of land registration in Scotland was taken advantage of in comparatively modern times to supplant this actual taking of possession by a symbolical taking of possession.

In 1845 it was enacted that it should no longer be necessary to proceed to the lands, or to perform any act of infeftment thereon, but that sasine should be given by producing to a notary the warrants of sasine, and expeding and recording an instrument of sasine. In the case of burgage subjects it was made optional to give sasine within the Council Chambers of the burgh by delivery of a pen.

This was truly the introduction of symbolical possession,—a mere symbol standing in the place of a fact. The giving of earth and stone on the ground of the lands is improperly spoken of as symbolical delivery. It was real, actual, and corporal delivery, and the piece of earth or stone was really a part of the whole.

It may be instructive at this point to note the close historical analogy between the English law of real property and our own as bearing on the law of possession,

A deed or writing was not necessary for the transfer of land at common law in England, but it seems to have been usual at all times since the 12th century.

The ceremony of giving and taking possession was called livery of seisin, and was performed much in the same way as with ourselves. Bracton says that the accustomed methods were *per ostium et per haspum vel annulum*, i.e. by the door, and by the hasp or by a ring. When the land was in the possession of tenants, they acknowledged or attorned to the new owner, and that was held equivalent to seisin.

Strange to say, livery of seisin fell into disuse at an early date by a side wind. Mr. Joshua Williams, in his book on the Principles of the Law of Real Property (p. 150, 10th edition), says, "A feoffment with livery of seisin, though once the usual method of conveyance, has long since ceased to be generally employed. For many years past another method of conveyance has been resorted to which could be made use of at any distance from the property; but as this mode derived its effect from the Statute of uses, it will be necessary to explain that statute before proceeding further."

Into this labyrinth I do not propose to follow him. Suffice it to say, that from the operation of that statute, passed in the year 1536, a system of conveyancing grew up which dispensed with the giving of possession on the ground of the lands. This was all very well with a complete system of registration, but in

England there was and is no such system, except in certain localities.

The publicity of transfer which the livery of seisin afforded, slight as it was, was thus swept away. An estate might change hands, so to speak, with the stroke of a pen. This opens a wide door to fraud. The crime of *stellionate*, under another name, is not unknown in England, and attempts have been made to establish a system of land registration, and it is probable that a complete system will soon be established. The late Sir Henry Maine, in his book on *Early Law and Custom* (pp. 352-358), saw in this aspiration after a system of public registration a return to the primitive system of the transfer of land in the face of the community in a new form appropriate to large and miscellaneous societies.

Actual and continual possession of real estate in England derives great importance from the fact that possession absolutely without title may be converted into full ownership by lapse of time. The right of the real owner is cut off by adverse possession on the part of the intruder for a period of twenty years in the general case.

This differs from the Scotch law. Our old common law contained no rules upon prescription. But the long negative prescription was introduced by statute in 1469; and in 1617, an age of great legislation and great lawyers, the age of Coke and Bacon in England, and of Lord President Binning and Sir Thomas Hope in Scotland, the Act was passed upon which our law of positive prescription of heritable rights has its foundation. Following the Roman law, it required a written title upon which to found prescriptive possession; a charter and sasine followed by possession for the space of forty years; and in the case of an heir, a sasine proceeding upon a *retour* or precept of *clare constat*, followed by possession for the like period, or sasines standing together for this period, and in the case of creditors a charter of adjudication and sasine, followed by possession of forty years after expiry of the legal. By the Conveyancing Act, 1874, section 34, the period has been reduced in certain cases to twenty years.

Without one or other of those warrants of possession, a man might possess for 100 years and have no better right than when he began. Of course, he has this advantage that only the Crown can put him out, according to the feudal rule that the

title to all land in this country flows from the Crown. No other one can disturb him who cannot show a title of some kind. According to the maxim, *In pari causa potior est conditio possidentis*, any attempt to eject him by force might lawfully be opposed by force.

In the matter of positive servitudes our law approaches that of England with regard to the effect of possession. The owner of ground held under a bounding charter may, by forty years' possession of a right of way over neighbouring ground, acquire a servitude of way. If his title be a non-bounding charter he may now after twenty years' possession acquire a right of property in adjoining land. So in England after possession for twenty years. But in the case of one of the negative servitudes there is a marked distinction. In the English law the mere fact of my window overlooking my neighbour's garden for twenty years without interruption gives me a legal right to this view for all time coming. If he wants to prevent this result he must shut out my view by putting up a large boarding, and so interrupt the running of prescription.

In Scotch law no negative servitude can be acquired by mere possession. It must be founded upon a written grant, because, properly speaking, there are no acts of possession which can be resisted.

In allowing a servitude of light to be thus acquired, the English law is true to its principle that mere possession is a root of title. The Scotch law, on the other hand, in allowing a right of property to be thus acquired under a non-bounding charter, and even in allowing a positive servitude to be thus acquired, is running counter to its principle that possession must be founded on title to become a root of property.

The nature of the acts of possession by which a right of property or a right of positive servitude may be acquired is the same in English as in Scotch law. These acts are well illustrated in disputes as to the rights of foreshore between the subject and the Crown, in which cases on both sides of the Tweed are quoted indiscriminately. Lord Fitzgerald said, in a recent Scotch case (*Lord Advocate v. Young*, 1887, 12 App. Cases 544), "By possession is meant possession of that character of which the thing is capable." Lord Blackburn said, in another Scotch case (*Lord Advocate v. Blantyre*, 1879, 4 App. Cases, 770),

"All that tends to prove possession as owners of parts of the tract tends to prove ownership of the whole tract. . . . And as the weight of evidence depends on the rules of common sense, I apprehend that this is as much the law in a Scotch as in an English Court." Lord Watson said, in the case first quoted, "Possession of the foreshore in its natural state can never be, in the strict sense of the term, exclusive. The proprietor cannot exclude the public from it at any time, and it is practically impossible to prevent occasional encroachment on his right, because the cost of preventive measures would be altogether disproportionate to the value of the subject."

From these judicial utterances two leading principles may be gathered:—

(1) Acts of possession must be interpreted according to the subject-matter.

(2) Acts of possession in a part may be evidence of possession of the whole.

The distinction between natural and civil possession may be shortly adverted to, so far as it bears upon heritable property.

The broad general distinction is that natural possession means the cultivation of lands and reaping the fruits, and the inhabiting of houses. Civil possession is possession by some other person through whom the law holds us to possess, as in the letting of lands and houses to tenants and drawing the rents.

Again, natural and civil possession may concur, as in the case of life-renter and fiar, mortgagor and mortgagee, rights of property and servitude, truster and trustee. The rule of the civil law was *Plures in solidum possidere non possunt*. This rule is satisfied by the fiction that the one possesses through the other in so far as may be necessary to support his particular right in the subject.

The effect of the truster's civil possession is exemplified in the rule in conveyancing that in the case of a trust for creditors or other temporary purpose, the trust is merely a burden on his title, and is evacuated by a discharge and not a reconveyance, and that the heir of the truster must make up a title to the truster,—a conveyance from the trustee to him being of no effect.

The importance of actual possession is shewn in the case of leases. A singular successor is not bound by a lease unless the tenant be in actual possession. This, again, is modified in the case of certain leases by the Registration of Leases Act, 1857, making registration equivalent to possession,—following the analogy of the Infestment Act of 1845.

Bona fide Perception and Consumption of Fruits.—One who honestly believes upon reasonable grounds that he is owner of the subject which he possesses cannot be called upon, on being dispossessed, to restore the fruits which he has reaped, or the rents which he has collected during the continuance of his *bona fides*. For it would be very hard if a man should in good faith bestow pains and expense upon a subject as his own, and reap and expend its fruits—perhaps living more lavishly than he would otherwise have done—and then be called upon to pay back every penny, it may be for many years and to his utter ruin. Rather let the loss fall upon the somnolent owner who neglected to assert his rights,—upon the principle *vigilantibus non dormientibus leges subveniunt*. How long the *bona fides* shall be held to continue is a question of circumstances. When the *conscientia rei alienæ*—the knowledge that he is violating the golden rule, *suum cuique tribuito*—arises in his breast, from that moment he must repay the uttermost farthing, not only what he has reaped, but what he might have realised with proper care, sometimes from the date of bare intimation, sometimes from citation in an action, sometimes not until final judgment is pronounced.

This is the great principle of the civil law as to *fructus bona fide percepti et consumpti* adopted and expanded in our own jurisprudence.

(b) *Moveables.*—We have thus traced the nature and some of the effects of possession in the domain of heritable rights. It remains to deal shortly with possession in its relation to moveables.

We saw that a double act was necessary for possession, an act of the body and an act of the mind,—detention with the purpose of holding the thing detained for our own use.

Possession may be either original or derivative,—(1) original, when a thing is laid hold of which has never been reduced to possession by any one, or which has been abandoned; (2) deri-

vative, when a thing which has been in the possession of one is transferred to another.

(1) *Original*—*Quod nullius est fit primi occupantis*.—It is a rare thing now-a-days to find something that belongs to nobody. The principle may, however, be exemplified in the capture of wild animals. At what point does possession in law take place? When the pursuit is started, or only when the animal is run down? The general rule is that pursuit short of capture will not do. What if there are two pursuers? This sometimes happens in the whale fishery. The rule followed is that if the whale remains attached to the boat from which the first harpoon was thrown, it remains the property of the first harpooner; if loose, it belongs to the second harpooner. Pearls enclosed in shells or pebbles cast on the shore belong to the finder. Wild animals which have escaped from restraint (as deer from a park), and regained their natural liberty, become the property of the first one who captures them; but animals of a tame nature, although they stray away from home, remain the property of their owner, and any one appropriating them commits theft.

In whose possession is an object of value—say a bank-note—which the owner lets fall on the floor of a shop, and which is picked up by a customer in the shop and handed to the shopkeeper to retain for the owner? The owner never turns up. The finder then sues the shopkeeper for return of the note, and he claims retention of it on the ground that it was found on his premises. That question arose in the case of *Hogg v. Armstrong & Mowat*, 1874, Guthrie's Select Cases 438, in the Sheriff Court of Glasgow, and was decided by Sheriff Guthrie in favour of the finder, on the ground that he had obtained possession against all the world except the true owner, and that the fact of its being found on the floor of the shop did not make the shopkeeper custodier of it.

If the note had been found in a hotel the decision might have been different, for the landlord is custodier for his customers of their goods therein. The goods are within the protection of his house.

The owner of lost property does not lose his right to reclaim until the lapse of the long negative prescription, except in the case of animals, which are lost to the owner on the

lapse of a year, and become the property of the Crown or its donatary.

The Scotch law as to treasures hid under ground is that they belong to the Crown as *escheat*. The Roman law gave half to the finder and half to the proprietor of the soil. An interesting question arose in England as to the property of an ancient canoe found embedded in the soil. It was claimed (1) by the leaseholder, and (2) by the freeholder. The decision was in favour of the latter, on the ground of his radical title to everything in the land of which he had not specially divested himself. (*Elwes v. Brigg Gas Co.*, 1886, 33 Ch.D. 562). This principle of the English law leads to the result that wild animals, such as rabbits or grouse, shot by a trespasser, become the property of the owner of the soil. In Scotland, at common law, they are the property of the man that shoots them, although that result is seriously modified by the Game laws and Trespass laws.

(2) *Derivative Possession*.—That is effected when one who is in possession transfers that possession to another, who accepts it.

The simplest case is the manual transfer of an object by one to another with intent to transfer ownership, or a limited right of use or control under a contract of hiring, pledge, or the like.

In each case the recipient is clothed with possession.

But in the great majority of cases there is no actual manual transfer of the article.

Change of possession of goods is effected without manual transfer—

(1) Through the delivery of the key of the place in which they are deposited.

(2) By a change in the title on which the goods are held.

(3) By intimation to the actual custodier, being a third person, to hold for behoof of a new possessor.

(4) By the transference of a mere symbol of property.

1. *Delivery of the Key*.—This is not, properly speaking, symbolical delivery, but the giving of a real and exclusive control over the goods. The Roman law required that the parties should be *at* the warehouse when the key was delivered. (*Si claves apud horrea traditæ sint*, D. xviii. 1. 74.) What if the seller retain another key, or can get access through a hole? This has been held not to affect the fact of possession, as the

taking advantage of such a thing would be a mere fraud on the contract.

In the converse case of the owner of a locked box delivering the box but reserving the key, it has been held that the contents of the box were not thereby delivered. (*Reddel v. Dobree*, 1839, 10 Sim. 244.)

2. *Change in the Title*.—Possession may be delivered so as to pass the property to the purchaser although the goods remain in the custody of the seller, if they so remain upon some subordinate contract made *bona fide* between the parties. Thus, the owner may sell the goods, and then, without parting with the custody, he may hire them from the purchaser, as was done in *Orr's Trustee v. Tullis*, 1870, 8 M. 936, and *Robertson v. McIntyre*, 1882, 9 R. 772; but if they merely remain in the order and disposition of the seller, they may be attached by his creditors in bankruptcy, as decided in *Sim v. Grant*, 1862, 24 D. 1033, the horse case. Here the seller retained more than the mere custody, which, in virtue of the Mercantile Law Amendment Act, 1856, would not have mattered—he had the use and possession, with a power of sale. In fact, the doctrine of reputed ownership applied. Where a public fact, like bankruptcy, occurs, and the trustee sells the furniture to a friend of the bankrupt, who conveys it to the bankrupt's wife, and the custody is never changed, it seems that the creditors cannot touch it on a second bankruptcy. (See *Scott v. Horsburgh*, 1889, 26 S.L.R. 362, and *Dick v. Borrowes*, 1852, 2 Stuart 13.) But if the buyer simply allows the bankrupt to remain in possession, the result is otherwise, as decided in the bathing machine case, *Edmond v. Mowat*, 1868, 7 M. 59. The distinction is certainly narrow.

If the buyer be already in possession on a contract of hiring, or pledge, or loan, there is a change in the character of the possession, without any change in the custody.

What if a man, in possession of goods as owner, wishes to reduce his possession to that of a mere hirer of the goods, can he do so by a mere contract, without any change of custody? This was competent in the Roman law, and the contract was called by the civilians *constitutum possessorium*. I am not aware of any instance of it in our law.

3. *Intimation to Custodier*.—Possession may be delivered while the goods are in the custody of a third person by the

agreement of the seller and buyer, with notice to that third person that they shall be held in the name or on account of the buyer. A delivery order is generally granted and intimated, and an entry made in the warehouse books.

The delivery order must be absolute in its terms. A qualified delivery order will not confer any *jus in re* good against creditors. (See *MacKinnon v. Max Nanson & Co.*, 1868, 6 M. 974.) A delivery order bearing on the face of it that the transaction was a pledge would not be made good by intimation merely;—actual custody of a pledge must take place. (See *Hamilton v. Western Bank*, 1856, 19 D. 152.)

Where the goods were in the seller's own bonded warehouse, it was at one time competent under statute to transfer the *jus in re* to a purchaser by a written contract of sale, accompanied by an entry in the officer's book. This was changed by 16 & 17 Vict. cap. 107; and there is no doubt that a second purchaser who had obtained actual possession would be preferable to a first purchaser who relied on an entry in the warehouse book.

An interesting application of this principle took place recently in the case of the *Distillers' Co. v. Dawson*, 1889, 26 S.L.R. 348. Whisky in A's bonded store was sold by A to B, who paid the price. B sold to C, who intimated his delivery order to A, and it was duly noted in the warehouse book. C then became bankrupt, and was owing A a large sum of money. A claimed to retain the whisky against this debt. The Court, by a majority of three to two, held that, as the goods were not in the hands of a third person, the possession had never been altered; that C had acquired no *jus in re*, but only a *jus ad rem*; and that in the balancing of accounts in bankruptcy A was entitled to retain the goods. The minority held that the intimated delivery order operated constructive delivery to C, and gave him a *jus in re*, and that C's trustee was entitled to delivery of the goods. I humbly think that the majority was right.

4. *Symbolical transference*.—The possession of goods is in some cases changed by the transference of a mere symbol of property, without any change in the custody or intimation to the custodier of the goods.

(a) The indorsation of a bill of lading for value is a familiar instance of this rule. Its effect is to transfer the right to possession of the goods. This depends upon mercantile usage and the impossibility of giving intimation to the shipmaster.

(b) The Factors' Act of 1877 places the indorsement of any document of title (including delivery orders, &c.) for the purpose of defeating the vendor's right on the same footing as the indorsement of a bill of lading. No intimation seems to be required. In the case of *Hugill v. Masker*, 1889, W.N. p. 30, this Act was applied where the purchaser of certain machines fraudulently got away the delivery order on the promise of paying cash next day. He then sold the machines to an innocent sub-purchaser for value, to whom he handed the delivery order, and who was held entitled to delivery as against the original owners. This is an Act which seems to be sometimes overlooked in Scotch cases.

The recent case of *Murdoch & Co. v. Greig*, decided by the First Division upon 6th February, 1889 (16 R. 396), has revived our interest in a much-vexed question. It was there unanimously decided that an innocent purchaser, at an auction sale, of a piano which had been given out on the hire-purchase system was bound to restore it to the owner. The Court found that the contract was not really a hire, but a sale under a suspensive condition. Yet they applied the same principle to its decision, *i.e.*, *assignatus utitur jure auctoris*.

A person having possession of goods under a limited title can confer no greater right upon a purchaser than he himself has. It is only in a limited sense that possession implies property in moveables. The burden of proof lies upon the real owner to show *quo modo desinit possidere*, that he had parted with the possession upon a limited title, such as hire, or deposit, or loan, or pledge, or subject to a suspensive condition. But when he has discharged this *onus* he is entitled to vindicate the possession even against the innocent victim of a fraud. When a fraud is committed some one must suffer, and it is said that he should suffer who has enabled the fraudulent person to commit the fraud. But surely the person who hires an article is acting legally and within his rights. The fact is that just as the resetter creates the thief, so the bargain-hunter fosters the fraudulent class. If a man is content to buy his goods in the ordinary way at a shop or warehouse where they are dealt in, he runs no risk. This decision of the Court only declares the law of Scotland as propounded by Stair, Bankton, and Erskine; and although doubt was thrown upon it by

Professor Bell, his opinion was controverted by Mr. Brown in his learned work on the law of sale, and by the learned editor of the last edition of the Commentaries. I venture to think that the opinion of the First Division, delivered by the most eminent living exponent of Scottish jurisprudence, has placed the law of possession of moveables, in this particular, upon a sound and wholesome basis.¹

It is only possible within the limits of a single lecture to sketch a bare outline of the law of possession. Enough has perhaps been said to give some idea of its history and development, to indicate the important part which it plays in our law of heritable and moveable property, and to induce the student to prosecute its study for the sake of the light which it sheds upon many points in our modern legal system.

¹ This latter topic was dealt with more fully by me in an article on "Property *v.* Possession" in the SCOTTISH LAW REVIEW for September, 1888.

LECTURE II.

THE LAW OF CONTRACT.

CONTENTS.—Rights and obligations reciprocal—Enforceable and non-enforceable obligations—Definitions of Contract—(1) Its formation—Offer and acceptance by parole—Writing—Conduct—Comparative view of English and Scotch Law—Capacity of parties—Error, force, and fraud—Subject matter lawful—*Malum in se*—*Malum prohibitum*.

WHEN a person is under obligation or engagement to another person to give something to him, or do something for him, or to abstain from doing something, that other person has a right to the performance of the obligation. This is what is meant when it is said that rights and obligations are reciprocal. A distinguished writer on moral philosophy has said, "All rights "are morally perfect, because wherever there is a moral duty to "another living being, there is a moral right in that other; and "when there is no duty, there is no right. There is as little "an imperfect right in a moral sense, as there is in logic an "imperfect truth or falsehood."

While this is quite true in ethics, there are numerous rights which the positive law of a nation will not enforce. If my brother is in want, through innocent misfortune, and I am rich, there is a moral obligation on me to relieve him, but the law will not compel me to do so. If one cricket club engages to play a game with another, and breaks the engagement, the law will give no compensation, although the first club may have gone to expense in preparing for the match. If you promise to dine with a friend, and break your promise, you cannot be made to pay any part of the cost of the dinner; and if the Dean and Council were not to fulfil their intention of giving a prize for the best answers on the subjects of these lectures, I believe that there would be no legal redress.

I mention these things in order to show you the proper sphere of contract. It has only to do with such rights and

obligations as the law will enforce, and excludes from its consideration many duties which no honourable man would leave unperformed, but which the law, for wise reasons, leaves to the court of a man's own conscience.

Erskine (iii. l. 16) defines a contract as "the voluntary agreement of two or more persons by which something is to be given or performed on one part, for a valuable consideration, either present or future, on the other part."

Bell (Pr., section 70) defines it as "the reciprocal undertaking or engagement of two or more persons whereby something is to be given or done, or abstained from, on the one side, for a valuable consideration or counter-engagement on the other. *Duorum pluriumve in idem placitum consensus et conventio*; each being bound, and each acquiring a right by the convention."

Pothier, a great French lawyer, whose writings on mercantile law are much valued in this country, defines it (Obligations, section 3) as "an agreement by which two parties reciprocally promise and engage, or one of them singly promises and engages to the other to give some particular thing, or to do or to abstain from doing some particular act."

And Sir William Anson, an eminent English writer on the law of contract, defines it as "an agreement enforceable at law, made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others" (p. 9, 4th edition).

We have then, in contract, the two elements of agreement and obligation such as the law will enforce.

Having seen what a contract is, the subject may be divided into the following heads, viz.:—

- I. How it may be formed.
- II. What is its operation.
- III. How it may be discharged.
- IV. The rules for its interpretation.

I. THE FORMATION OF A CONTRACT.

I.—In forming a contract, it is required that the minds of the parties should meet. The most common way of effecting this is by offer and acceptance. The offer may be by parole, by writing, or by conduct.

(a) An offer is made by *parole* when the parties meet face

to face. Suppose two farmers meet on a market day, and the one says to the other, "I will sell you my horse at the price of £30," that is a valid offer. If farmer B says, "I accept that offer," or "Done," or any equivalent words, an effectual contract is at once made, which either party can enforce. But if farmer B says, "I will give you £25," that is a rejection of the offer, which at once falls to the ground, and can no longer be accepted unless renewed. Suppose farmer B says, "I will think over it till to-morrow," the offer falls to the ground, for it is settled law that a verbal offer must be accepted before the parties separate. Suppose farmer A says, "I will sell you the horse at the same price as my father paid for it," and B accepts the offer, and it turns out that A's father got it as a gift, there is no contract, for one of the essentials of the contract of a sale (*i.e.*, a price, or the means of fixing a price) is wanting, and A did not intend to make a present of the horse to B. Suppose that the parties strike a bargain at £25, and B adds, "If the horse is lucky to me I will give you £5 more," it has been held that payment of this additional sum cannot be enforced, and depends entirely on B's pleasure, for it is not the business of courts of law to decide upon matters of luck. Suppose the parties contract for the purchase of the horse at whatever price may be fixed by farmer C, then the contract is perfectly binding, as the price may be fixed *ad arbitrium boni viri*.

You will have gathered from these simple illustrations that a valid contract regarding goods may, in the general case, be made by verbal offer and acceptance provided the offer contain the legal essentials of the contract which is being negotiated, and that the acceptance meet the offer, and that it be given before the parties separate, and before the offer is withdrawn.

(b) Written offer and acceptance. Suppose that the two farmers are at a distance from each other, one in Stirlingshire and the other in Ayrshire, and are making their bargain by exchange of letters, let us consider what is necessary in order to make a contract. A very important question is, at what moment does the contract become complete? Suppose that the letter of offer is put into the post office at Stirling, it is entirely beyond the control of the sender, and if when the offeree receives it, he at once writes accepting, the contract is completed. If the sender retracts his offer and posts a recall which arrives before the receiver

has sent his acceptance, the recal is in time. But if the acceptance has been posted, whether the offerer has received it or not, the recal is too late. And even if the acceptance should miscarry in the post, and be delayed or even lost (if properly addressed), it would seem that the contract is binding. As Lord Blackburn said, "The acceptor, in posting the letter, has put it out of his control, and done an extraneous act which clenches the matter, and shows beyond all doubt that each side is bound." (*Brogden v. Metropolitan Ry. Co.*, 1877, 2 App. Ca., 691). This point, however, cannot be regarded as settled in Scotland, for Lord Shand expressed an opposite opinion, *obiter*, in *Mason v. Benhar Coal Co.*, 1882, 9 R. 883.

Of course the acceptance must be sent within a reasonable time, or the offer is held to have fallen. What is a reasonable time is a question of circumstances. In mercantile transactions an answer should be sent by return of post; but four days has been thought not unreasonable in accepting an offer to purchase land, in *Thomson v. James*, 1855, 18 D. 1. A delay of five weeks in accepting an offer to execute the ironwork of a building was held far too long, in *Wylie & Lochhead v. McElroy*, 1873, 1 R. 41.

If the offerer say that his offer will be binding until a certain date, can he recal the offer before the expiration of the time?

In England it has been decided that he can, on the ground that no consideration has been given for the promise to keep the offer open (*Dickenson v. Dodds*, 1873, 2 Ch. D., 463). In this the English law follows the Roman law, expressed in the maxim *ex nudo pacto non oritur actio*.

Our law, on the other hand, has rejected this principle, and followed the Canon law, which saith, *omne verbum de ore fideli cadit in debitum*. Accordingly, it is most probable that in Scotland the offerer would be held bound for the time specified. So Bell lays down the law (Pr. section 73), and Stair and Erskine seem to favour that view. The principle that both parties must be bound, or neither, applies rather to a contract that has been formed, and from which one party seeks to shake himself free.

An important element in the formation of a contract by exchange of letters is that the acceptance must exactly meet the offer. If the acceptance contain a material condition, it amounts to a counter offer, which in its turn requires acceptance. But a mere expression of what the law would imply will not destroy

the acceptance, *e.g.*, if the acceptance of an offer to sell land should say, "the seller to furnish searches, and the expenses of conveyance to be paid mutually."

(c) Offer and acceptance may arise out of the *conduct* of the parties, and make a valid contract.

Thus, the cars which run between Stirling and Bridge of Allan tacitly invite the public to ride in them for a certain fare. If I take my seat in one of them I tacitly accept that invitation, and a contract is created between me and the car company, with all the usual incidents of the contract of carriage of passengers. So a railway company by publishing time tables enters into a contract with any member of the public travelling by the line that they shall use all reasonable endeavours to run their trains up to the advertised time. So the police in advertising a reward for the detection of a criminal, or a lady for the recovery of a favourite dog, enters into a contract with the person who gives the required information which can be legally enforced. So the advertisement of a sale "without reserve" entitles the highest bidder to insist upon the subject of sale being knocked down to him. If a shopkeeper exhibit goods in his window ticketed at a certain price, it seems that he makes an offer which any member of the public may accept by tendering the price and claiming the article.

Bell (Pr., sec. 76) lays down the doctrine that "tacit acceptance may be inferred from silence where the proposal is so put as to require rejection if the party do not mean to assent; as when a merchant writes to another that he is, against a certain day, to send him a certain commodity, at a certain price, unless he shall previously forbid."

It is doubtful whether this doctrine be not stated too broadly. An English writer (Anson, p. 15) says, "Where conduct is relied upon as constituting acceptance, it must be something more than mere silence; it must be silence under such circumstances as to amount to acquiescence"; and again, "A person making an offer may not turn the absence of communication into an acceptance, and compel the recipient of his offer to refuse it at peril of being construed to have accepted it."

We will next proceed to consider the cases in which a particular form is required in order to give legal efficacy to the intentions of the parties.

In this respect our law is much more simple than that of England. There is an English statute called the Statute of Frauds (29 Car. II. cap. 3) which, *inter alia*, provides that no contract for the sale of goods for the price of £10 or upwards shall be allowed to be good, except the buyer shall accept part of the goods so sold and actually receive the same; or give something in earnest to bind the bargain, or in part payment; or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto authorised.

The decisions upon this provision form an extensive chapter in the English law of contract from which we are free; and no one will say that our law of sale is any the worse for wanting it. I have already adverted to the English rule that no contract of sale is binding unless (1) a consideration has been given on the one side for the promise or engagement on the other; or unless (2) it is reduced to the form of a deed executed by the parties not only by their signatures but by their seals. Then the consideration must be of some value in the eye of the law, must be legal, may be present or future, executed or executory, but must not be past. Love, favour, or affection, or motives of honour, gratitude, piety, or friendship have no weight in the scales of "consideration."

I think that Scotch lawyers may congratulate themselves not only that they are freed from all the subtle distinctions which these doctrines have evoked, but also that our system of jurisprudence leaves a man free to act upon the nobler impulses of his nature, without leaving him *or his heirs* open to the temptation of repudiating a just obligation on the ground of want of consideration.

There are certain contracts in our law which require to be reduced to writing in order to make them valid.

(a) Contracts for the transfer of heritable property.—This rule probably sprang from the importance of landed property under the feudal system, although, as we saw in a former lecture, there was a time when writing was not required for a grant of land by a lord to his vassal. The writings must be either holograph or tested, or at least signed before two witnesses who subscribe their names. This last form can be made good under the provisions of the Conveyancing Act, 1874. Even

a verbal contract of feu which was followed by possession, the erection of buildings, and the granting of receipts for feu duty (which specified the extent of the subject) has been held binding against an heir, in *Smith v. Marshall*, 1860, 22 D. 1158, and even against a singular successor who knew the feuar's acts, in *Stoddart v. Dalziel*, 1876, 4 R. 236. (See also *Stewart v. Burns*, 1877, 4 R. 427.) This is the important equitable doctrine of *rei interventus*, which means that something of importance has taken place on the faith of the contract made, although the proper formalities have not been observed.

(b) A lease for more than a year requires to be in writing, and holograph or tested. But an informal writing, if followed by possession, becomes good for the full period of the lease.

(c) A contract of service for more than a year follows the same rule. (*Stewart & McDonald v. McCall*, 1869, 7 M. 544.)

(d) In terms of the Mercantile Law Amendment Act, 1856, all guarantees, securities, or cautionary obligations must be in writing and subscribed by the person undertaking them, or some person duly authorised by him. This is a sweeping enactment, and seems to exclude the operation of *rei interventus* and of reference to oath. In *re mercatoria* an informal writing would be sufficient; and although a holograph or tested writing be necessary in a guarantee not in *re mercatoria*, yet *rei interventus* following on an informal writing would validate the guarantee. It would seem that a *del credere* guarantee does not require writing, on the ground that it is merely an incident to the contract of principal and agent, but this has not been decided in Scotland.

(e) Although the contract of partnership may be proved *rebus ipsis et factis* when once it has come into existence, yet the Court will not compel the parties to enter into that relation on a mere written contract to become partners, where the terms of the proposed partnership have not been fixed in the writing. In short, the Court will enforce a contract when made, but will not make a contract for the parties; nor will they give damages against the party refusing to fix the terms of the contract, for he is acting within his rights in drawing back before the contract is complete, or, in other words, he has *locus pœnitentiæ*. (*McArthur v. Lawson*, 1877, 4 R. 1134.)

(f) Bills of exchange and promissory notes must be in writing, and the acceptance of a bill of exchange must be in writing.

(g) Assignations of copyright, of patents, and of policies of life insurance must be in writing. The mere delivery of the document of title has not, by the law of Scotland, any effect to transfer the property, or even to give a valid security. By the law of England, on the other hand, a valid security is created by the deposit of a document of title accompanied by a letter explaining the nature of the transaction. This is called an equitable mortgage, and is extensively practised in England in obtaining loans from banks.

(h) Contracts of marine insurance must be made in the form of a policy. (30 Vic. cap. 23, sec. 7.)

(i) The transfer of shares in a joint-stock company is made in the form prescribed in the Companies' Act, 1862, or in the articles of association of the company, and in the case of companies governed by the Companies' Clauses Act, 1845, in the form prescribed by that Act.

(j) There are several instances in which the form of sealing is required in contracts made according to the Scotch law. Thus a corporation, as a general rule, executes a contract by the use of its common seal. A British ship, or a share therein, can only be transferred by a bill of sale in the form prescribed by the Merchant Shipping Act, 1854, which is sealed as well as signed by the granter.

The next requisite for the formation of a valid contract is that the parties should be capable of contracting. If one of the contracting parties be a pupil, or a minor without the consent of his curators, or (in the general case) a married woman without the consent of her husband, or a person of unsound mind, or a person in a state of intoxication, then the contract will not be valid. But as this branch of the subject forms rather a branch of the law of persons than of the law of contract, we pass it over.

It is further essential to the formation of a valid contract that the consent on both sides should have been given without error, without force or fear, and without fraud.

(a) *Without error.*—Erskine (iii. 1. 16) says, "This obtains, whether the error regards the person of the other contracting party, as if one became bound to James when he had reason to believe he was contracting with John; or the subject matter of the contract, as if one contracting to sell a piece of gold-plate should deliver to the purchaser one of brass; but if the error

“lies only in the accidental qualities of the subject, the contract is valid, *e.g.*, if the gold has a greater mixture of alloy than it ought to have had.”

The illustration of the brass delivered for gold is rather a case of non-implemēt of the contract than of error. Error takes place where the one party is thinking of one thing, and the other party of another thing; as where there are two things of the same name, and the first means to sell the one, while the second means to buy the other. Here the minds of the parties do not meet.

(*b*) *Without force or fear*.—Instances of this were common in Scotland in the 17th century, but it is rather difficult to find a modern instance. We may take the recent English case of *Scott v. Sebright*, 1886, 12 P.D. 21, where a wealthy young woman of twenty-two had become engaged to an unprincipled adventurer, who had induced her to sign bills for him to a large amount, on which proceedings were taken against her. When in a state of bodily and mental prostration occasioned by this, and by certain threats which he uttered, she was induced to go through a ceremony of marriage with him at a registrar's office. The marriage was never consummated. The Court held that there was not such a consent on her part as the law requires for the making of a contract of marriage, and declared it null and void.

There is a milder kind of constraint, called undue influence, *e.g.* by a parent over a child, a guardian over a ward, a lawyer over his client, or a doctor over his patient, which will interfere with the formation of a valid contract. We have an illustration of that in the case of *Gray v. Binnie*, 1879, 7 R. 332, where a mother took advantage of the pecuniary necessities of a son to get him to surrender his interest in an estate for an inadequate sum. The contract was set aside.

The English law has applied this principle to cases where personal influence was abused, although there was no fiduciary relationship, as in *Smith v. Kay*, 1859, 7 H.L.C. 750. It even sets aside contracts where one has taken advantage of the unprotected condition of the other to drive a hard bargain. The Scotch law has not gone this length; and in the case of *M'Lachlan v. Watson* (n.r.), the Court refused to set aside a contract which was challenged on somewhat similar grounds.

In the case of *Andrew v. Buchanan*, 1873, 11 M. (H.L.) 13, the House of Lords refused to relieve the vassal against a contract of feu in which he was taken bound to build and maintain a villa upon the ground, while at the same time the superior had reserved power to work the minerals below it, and to bring it down about his ears without compensation. The principle is that if parties who are *sui juris* enter into hard bargains, they must abide by them. See also *Shylock v. Antonio*, decided by the Court of Venice, and reported by Shakespeare in the "Merchant of Venice."

(c) Consent will be subject to recall if it has been induced by fraud, and in certain cases even by innocent misrepresentation or non-disclosure of facts.

The contracts in which the presence of the latter elements are fatal are (1) marine insurance; (2) fire insurance; (3) contracts for the purchase of shares in a company on allotment. These contracts are said to be *uberrimæ fidei*, because the position of the parties is such that the one is entirely dependent upon the representations of the other for the facts, and he is therefore entitled to rely upon a full and truthful statement. Non-disclosure therefore of any material circumstance known to the party effecting the insurance or issuing the prospectus, makes the contract voidable and *a fortiori* any misrepresentation of fact, although innocent.

Fraud strikes more deeply at the formation of contracts. I may give the definition of an English writer, "Fraud is a false representation of fact, made with a knowledge of its falsehood, or in reckless disregard whether it be true or false, with the intention that it should be acted upon by the complaining party, and actually inducing him to act upon it." This definition is scarcely broad enough to cover the Scotch law of fraud. Under the Scotch law the seller of an article who knows of a latent defect and does not disclose it is guilty of fraud, and the contract may be annulled on that ground. (*Rough v. Moir*, 1875, 2 R. 529.) In the English law, on the other hand, the seller is not bound to tell the latent defects in his wares. (*Ward v. Hobbs*, 1879, 4 Appeal Cases, 14.) Mere non-disclosure, therefore, which falls short of industrious concealment, may amount to fraud in Scotch law, at all events in the contract of sale. The difference may be reconciled in this way, that as a man is

supposed to know the general law of his country, a Scotchman knows that a certain course of conduct is fraudulent, according to his code; an Englishman knows that it is not, according to his code. A high authority has said, "To him that esteemeth any-thing to be unclean, to him it is unclean." Each may act according to the law of his country with a good conscience, although I think our rule is more in accord with the moral law.

To entitle a person to set aside a contract on the ground of fraud it must have given rise to the contract; it must have been *dolus dans causam contractui*. If the fraud is merely incidental, or arise in carrying out the contract, it may give ground for an action of damages, but not for rescinding the contract. The recent case of *Dunnett v. Mitchell*, 1887, 15 R. 113 (in which the pursuer failed to prove fraud), is instructive as showing the nature of the case which must be made out.

The fraud of an agent in carrying through a contract is equally fatal, although the principal was quite innocent of the fraud. The principle is that no one can honestly retain an advantage which has been got by the fraud of the person representing him. (*Traill v. Fernie and Others*, 1876, 3 R. 770.)

The subject of fraud unfortunately forms a voluminous chapter in the modern law of contract. We cannot dwell further upon it; but pass on to the remaining requisite to the formation of a valid contract, viz., that the subject matter of it be such as the law permits.

The forbidden objects may be divided into two classes, *malum in se* and *malum prohibitum*, the first class being forbidden at common law because of some inherent infraction of the moral law, and the second being forbidden by statute, because of some reason of state or revenue.

(a) *Malum in se*.—An agreement to commit a crime would, of course, be void. Thus, if Pigott had agreed to forge the Parnell letters for a sum of money, he could not have enforced payment, nor could the money have been got back if it had been paid to him, and he had then failed to forge the letters. Any agreement to commit a civil wrong is void, e.g., for the publication of a libel, or for a secret preference under a composition arrangement with creditors. A trade mark will not be protected for an article used to deceive the public, as essence of hops used to adulterate beer. (*Estcourt*, 1875, 10 Ch. App., 276.) Even a contract as to an

innocent article will be void if, in the knowledge of the parties, it was to be used for an immoral object. So, in the case of a brougham hired to a prostitute for the purposes of her calling, the Court refused action for the hire. (*Pearce v. Brooks*, 1866, 1 Ex. 213.) So a contract to induce a woman to live in immorality with a man will not be enforceable, although a contract to enable her to return to a virtuous life will be supported. But if a party repent before the illegal purpose is carried out, and seek back his money or property, the Court will in general give its aid. (*Taylor v. Bowers*, 1876, 1 Q.B.D. 300.) A curious distinction has recently been drawn by the English Court of Appeal in a betting case. Payment of a bet cannot be enforced at law; but if a betting commissioner be employed to make a bet, and he pay the bet when lost, he may recover it from his employer if he can show that he would have been expelled from the club of which he was a member for non-payment. (*Read v. Anderson*, 1884, 13 Q.B.D. 779.) I do not think the Scotch Courts would follow this decision. Stakes won at a lawful game, as a horse race, may be recovered from the stakeholder. (*Calder*, 1871, 9 M. 1074.)

There is a class of contracts which do not infringe the moral law, but which are said to be contrary to public policy, and therefore not enforceable. Such are contracts in undue restraint of trade, contracts tending to injure the public service, as assignments of salaries or pensions by public servants, agreements which tend to encourage litigation (as *pacta de quota litis*), gifts by a client to an agent, while that relation subsists between them, agreements in undue restraint of marriage, agreements among masters or among workmen to restrain the liberty of contract, agreements altering the rules of public law, as if a man were to agree to limit the days of charge on a bill from six to three. Into the details of these we have not time to go.

(b) *Malum prohibitum*.—If a statute says that a contract is illegal or void, no question can arise; but if it merely imposes a penalty, the question does arise whether that amounts to a prohibition. The general rule is that if the penalty for infringement be imposed once for all, there is no prohibition; but if imposed for each recurring breach, that amounts to absolute prohibition of the contract struck at.

LECTURE III.

THE LAW OF CONTRACT.

(CONTINUED.)

CONTENTS.—(2) Operation of Contract—*Jus tertii*—*Jus quæsitum tertio*—*Delectus personæ*—*Assignatus utitur jure auctoris*. (3) Discharge of Contract — Form — Causes — Novation — Delegation — Performance — Breach—Damages for breach—Conditions precedent, concurrent, subsequent — Supervening impossibility. (4) Judicial interpretation—Comparative view of English and Scotch Law.

II. THE OPERATION OF CONTRACT.

HAVING seen how a contract may be formed, we next consider some of the rules that govern its operation. These may be arranged under certain Latin phrases and maxims, which are very convenient pegs upon which to hang the principles of the law so that they may be retained in the memory. When a student of the law looks at the vast number of volumes of reported cases, and the innumerable treatises on special subjects in our own and in the English law, he feels discouraged. But the leading principles of the law are not very numerous, and the aim of the student should be to fix these in his memory, “like a nail fastened in a sure place.” He is the ablest lawyer who can readily apply the clue of principle to the labyrinth of facts. Many of these principles of our law are crystallized in Latin maxims mainly derived from the Roman law, and the student would do well to commit them to memory.

Four important principles in the law governing the operation of contract are expressed in the following phrases:—

1. *Jus tertii*.
2. *Jus quæsitum tertio*.
3. *Delectus personæ*.
4. *Assignatus utitur jure auctoris*.

1. *Jus tertii*.—This expresses the general principle that the parties to the contract are alone bound by it or entitled to plead

it. The same principle is expressed in the maxim, *res inter alios acta, aliis nec prodest nec nocet*. Take the case of a contract of sale of a house under burden of a bond where the bond is to be treated as part of the price, and the purchaser binds himself to pay and so to free and relieve the seller of the bond, that is not an obligation which the bondholder can enforce against the purchaser. He is not a party to the contract; it was not intended for his benefit; it is *jus tertii* to him. (*Kippen v. Stewart*, 1852, 14 D. 533.) The Conveyancing Act, 1874, provides, indeed, that the seller and purchaser may specially agree in the conveyance that the personal obligation in the bond is to transmit against the purchaser, and thus save the expense of a personal bond of corroboration; but apart from that special statutory agreement, the bondholder has no benefit from the contract between seller and purchaser.

Again, if I employ a contractor to build a bridge for me, and he purchases iron and stone from various merchants on credit, they have no claim against me for the price, although their goods have gone into my bridge. There is no privity of contract between them and me. They must look to the person with whom they contracted. (*Smith v. Scott & Best*, 1881, H.L. 19 S.L.R. 538.)

2. *Jus quæsitum tertio*.—This maxim, which means “a right vested in a third person,” may be said to form the complement of the previous maxim. It expresses the rule that if in a contract between A and B there be a provision in favour of X, which was *an object of the contract*, then X will be entitled to enforce it. A familiar instance of this occurs (1) where the superior feus his land in separate lots for building purposes upon a uniform plan, and inserts in each feu-right conditions as to size and design of buildings, along with an obligation that he will put similar conditions in the other feu-rights, the principle being that these clauses must have been inserted to be enforceable by the feuars *inter se*; (2) where the superior feus out a considerable area without a building plan, but with distinct restrictions which the feuar is taken bound to insert in all dispositions and sub-feus, the principle in the latter case being that a sub-feuar or disponent acquiring a portion of the original feu must be held as agreeing that the restrictions are for mutual behoof of the proprietors of parts of the original

feus, and mutually enforceable by them. (*Hislop v. M'Ritchie*, 1881, 8 R. H.L. 95.)

The leading cases dealing with this principle to be found in our books are cases in which the right was denied. Such are the cases of *Peddie v. Brown*, 1857, 20 D. (H.L.) 1, and *Finnie v. Glasgow & South-Western Railway*, 1857, 20 D. (H.L.) 2 both decided by the House of Lords, and *Blumer v. Scott*, 1874, 1 R. 679. One case, however, may be figured which occasionally arises in the Sheriff Courts in mining districts. If a proprietor let the surface to a farmer, and the minerals to a coalmaster, and if he insert in the farmer's lease a provision that he is to claim his surface damages from the mineral tenant, and in the mineral lease a provision that the coalmaster is to settle direct with the farmer, then there can be no doubt that the farmer has a *jus quæsitum tertio* in the provision in his favour in the mineral lease. It requires, however, to be very clear in all cases that the third person was intended to benefit directly by the contract.

In England the rule is even more severe. There must be something of the nature of a trust created in favour of the third person before he will be allowed to sue upon the contract.

In *Ely v. Positive Government Security Life Assurance Company*, 1876, 1 Ex. D. 88, one of the articles of the association of the defendant company provided that the plaintiff should be employed as its permanent solicitor. The action was brought for a breach of contract in not employing the plaintiff. Lord Cairns, in delivering the judgment of the Court of Appeal, said, "Articles of association, as it is well known, follow the memorandum, which states the objects of the company, while the articles state the arrangement between the members. They are an agreement *inter socios*, and in that view, if the introductory words are applied to article 118, it becomes a covenant between the parties to it that they will employ the plaintiff. Now, so far as that is concerned, it is *res inter alios acta*; the plaintiff is no party in it. No doubt he thought that by inserting it he was making his employment safe as against the company; but his relying on that view of the law does not alter the legal effect of the articles. This article is either a stipulation which would bind the members, or else a mandate to the directors. In either case it is a matter

“ between the directors and the shareholders, and not between them and the plaintiff.”

Of course, it is quite unprofessional for an agent to insert his name in any articles of association or trust-deed with the view of securing permanent employment. A similar clause was sometimes inserted by the agents of superiors in feu-charters to the effect that the infeftment in favour of the vassal should be expedite by the superior's agent, but it was very roughly handled by the House of Lords, and has been declared null and void by the Conveyancing Act, 1874. It is satisfactory to know that on principle such clauses are not enforceable by the agent who inserts them.

It has been said that a contract imposes a *duty* upon third persons not to interfere with its due performance. An action of damages will lie at the instance of an employer against any one who maliciously induces his apprentice or his workman to break the contract of service. (*Couper & Sons v. Macfarlane*, 1879, 6 R. 683.)

This principle has been extended in England to every contract. The Court, by a majority, laid down the broad principle that a man who induces one of two parties to a contract to break it, intending thereby to injure the other, does that other an actionable wrong. (*Bowen v. Hall*, 1881, 6 Q.B.D. 329.) This is a far-reaching principle, and as it does not depend upon any technicality of the English law, the decision will have great weight when a similar question comes before our Court.

3. *Delectus personæ*.—This phrase expresses the general principle that when A contracts with B, he has a right to expect that B shall perform his part of the contract and not devolve the performance upon X. This holds strictly where B has been selected because of his special skill—*e.g.*, an artist to paint a picture, an author to write a book, an actor to play a part.

There is, however, a wide exception to this principle. When the work can be performed as well by a stranger to the contract, there is no legal objection to his being employed, unless there be a special stipulation to the contrary. Thus, a contractor for a great undertaking, such as a railway or a canal, employs sub-contractors to do sections of the work, for whom, however, he remains responsible to the employer. A trustee in a bankruptcy, by virtue of the assignation of which his act and warrant

is the symbol, can adopt the bankrupt's contracts if he is of opinion that they will be beneficial to the creditors. (*Anderson v. Hamilton & Co.*, 1875, 2 R. 355.) In that case Lord Neaves said, "The result of my opinion is that, where there is no *delectus personæ* in a contract, the creditors and trustee of "a bankrupt contracting party are, in general, entitled to take "it up, provided they do so timeously, and do not interfere with "the equitable rights of the other contracting party, who must "not be subjected to indefinite delay or disappointment."

There is a third class of contracts which seems to stand upon the border line between the two classes which I have been considering. I refer to the contract in which a manufacturer undertakes to supply goods (such as iron plates for shipbuilding) of the kind manufactured by him without saying that they will be of his make. Is it proper implement of the contract for him to supply goods manufactured by some one else? This question has been decided in the affirmative in Scotland, and in the negative in England, in each case by two to one, and in each case overturning the judgment of the Court below. (*West Stockton Iron Company v. Nielson & Maxwell*, 1880, 7 R. 1055; *Johnston v. Raylton*, 1881, 7 Q.B.D. 438.) The main argument for the affirmative is that the contract does not say that the goods are to be of the manufacturer's own make, and that the Court will not add a new term to the contract; and that for the negative is that the goods being ordered of a manufacturer and not of a dealer, there is a reasonable implication that the goods are to be of his make. This difference of opinion will require to be settled by the House of Lords.

We saw that contracts are made up of rights and obligations, and we have considered how far the obligations are transmissible. Let us now look at the matter from the other side. The rights under a contract are generally transmissible when they resolve into the receipt of money or goods. Thus, by simply endorsing at the foot of an account due to me the words "Pay "this account to X," and signing my name across a penny stamp, I transfer my right to exact payment; and upon intimation of the order to the debtor, my indorsee steps into my shoes. The transfer is not complete without the intimation, and if in the meantime some other creditor of mine arrests the money in the hands of my debtor, my indorsee is cut out.

There is a class of contracts in which the rights held by one party are represented by a symbol called a negotiable document. This means a document which passes from hand to hand by simple indorsation, which requires no intimation to the debtor, and which gives to the holder the right to exact performance. Such is a bill of lading, the simple indorsation of which for value confers upon the indorsee an absolute title to the goods which it represents, and that without any intimation to the captain of the ship in which the goods are being carried. Such also is a delivery order or other document of title, by virtue of the provisions of the Factors' Act, 1877. As we saw in a former lecture, that Act places these documents of title very much on the same footing as a bill of lading, dispensing with intimation to the holder of the goods.

Bills of exchange and promissory notes are also negotiable documents requiring no intimation for their valid transfer, but they scarcely fall within the scope of our subject.

We never were hampered in Scotland with the technical difficulties that beset the path of the assignee in England in enforcing a contract. At common law he could not sue in his own name, but required to sue in the name of his cedent. He could sue in the Court of Chancery in his own name, subject to certain conditions ; and a series of statutes has now removed his disabilities. The Bills of Lading Act, 1855, allowed the assignee of a bill of lading to sue in his own name ; the Policies of Life Insurance Act, 1867, gave the like privilege to the assignee of a life policy ; and, finally, the Judicature Act of 1873, section 25 swept away the distinction between common law and equity, and gave to the assignee of any debt or legal *chose in action* all legal rights and remedies, subject to certain conditions.

Let us now glance at certain contracts in which the *rights* of the parties are not assignable on the principle of *delectus personæ*. One of these is the contract of partnership. As in marriage, so in mercantile partnership—the partners are generally chosen for their personal qualities, although in both contracts the possession of capital has always a great weight. No partner, therefore, can introduce a substitute into his place unless he has reserved power to do so. Even the heirs of a deceased partner cannot claim the right of stepping into his shoes and carrying on the business ; the rule at common law is

that it must be wound up. In the contract of lease of land of ordinary duration there is, at common law, an exclusion of assignees and sub-tenants, on the principle that the landlord has selected his tenant for his fitness as a farmer. This principle, however, is not pushed so far as to exclude the heir of the tenant upon death; and it has been farther relaxed by the Agricultural Holdings Act, 1883, which allows the tenant to bequeath his lease. The landlord has the power to state any reasonable ground of objection; and if the Sheriff sustains the objection, the lease goes to the heir. In urban subjects the power of assigning and sub-letting is implied, on account, I suppose, of the common practice of "flitting" in burghs, and of one tenant being in general as good, or as bad, as another.

Death operates as a transfer from the deceased to his representatives of his rights and liabilities under all contracts to which he was a party, except such as are of a purely personal nature, *e.g.*, contracts of service. An interesting example of this exception occurred in *Hoey v. M'Ewan & Auld*, 1867, 5 M. 814. A firm of accountants in Glasgow was dissolved by the death of one of the partners. There was a current contract of service between the pursuer and the firm, which the defenders treated as brought to an end by the dissolution. The pursuer brought an action of damages as for breach of contract. The Court held that the contract fell with the dissolution, and that there was no breach.

The general rule may be illustrated by the case of a continuing guarantee, or cautionary obligation, *e.g.*, for a bank agent or for the tenant in a lease. The obligation continues good against the representatives of the cautioner, even for such intrusions as have taken place after the death of the cautioner, and that without any notice to the representatives. (*British Linen Company v. Monteith*, 1858, 20 D. 557.)

Rights of action for something purely personal to the deceased do not, in England, transmit to his representatives, on the principle of the civil law, *actio personalis moritur cum persona*, *e.g.*, an action of damages for breach of promise of marriage. (*Chamberlain v. Wilson*, 1814, 2 M. and S. 408.)

But in Scotland we have not followed the rule of the civil law; and, after some difference of opinion on the bench, it seems established that an action of damages for slander, or for

personal injuries, or for breach of a purely personal contract, may be raised by the representatives of a deceased person. (*Auld v. Shairp*, 1874, 2 R. 191; *Wights v. Burns*, 1883, 11 R. 217.) It is also decided that a claim of damages as solatium for wounded feelings may be constituted and enforced against the representatives of the wrong-doer. (*Evans v. Stool*, 1885, 12 R. 1295.)

4. *Assignatus utitur jure auctoris*.—When one of the parties to a contract assigns his interest in it to a third person; or when upon death, or bankruptcy, the operation of the law vests it in his representatives or creditors, the third person on the one hand, and the representatives or creditors on the other hand, take the right subject to the same drawbacks as attached to it when in the hands of the original holder. There is a special reason for that in the case of the representatives or creditors, for their right is only a continuation of the right of the deceased person or of the bankrupt. The law says that the heir is *eadem persona cum defuncto*, and that the trustee takes *tantum et tale*. But the assignee may have paid a full price for the right. It is only fair, however, that the other party to the contract should not be prejudiced by the assignation, and it is the business of the person purchasing the right to make full enquiries, and to make a careful search, before he completes the transaction. In the case of land rights, our system of registration enables a purchaser to act with a great degree of security. He purchases on the faith of the records, and is not affected by anything not disclosed there. But the purchaser of moveable property has not the same protection. The article may have been stolen, it may be held on hire, or in pledge, or subject to a suspensive condition, and the seller may be committing a fraud upon him. Yet the true principle is that a man can transfer no better right than he has himself; and when reasonable precautions are taken, there is not in practice a great deal of risk.

Negotiable instruments form an exception to this rule. The indorsee for value, and without notice, of a bill of exchange or bill of lading, or of any of the documents falling under the Factors' Act, 1877, is not affected by any equities that may exist between the original parties to the contract. This is for the benefit of commerce, which requires that mercantile transactions should be capable of being carried through with security and

with despatch. A bill payable to the bearer or blank endorsed, even if stolen, cannot be vindicated as against a *bond fide* holder for value and without notice or negligence. But this is not extended to documents, such as debentures of a company, expressed to be payable to bearer, but which are not negotiable according to the law merchant. (*Crouch v. Credit Foncier of England*, 1873, L.R. 8 Q.B. 374.)

III. DISCHARGE OF CONTRACT.

We will first consider shortly the form in which a contract may be discharged, and secondly the causes of discharge.

1. *Form.*—*Nihil tam naturale est, quam unumquodque eodem modo dissolvi quo colligatur.*—The general rule is that a contract should be dissolved in the same form in which it is constituted. If it be brought into existence by a formal deed, it should be released in the same way; if by writing *in re mercatoria*, then a discharge in the same form will suffice. A payment of money exceeding £8 6s. 8d. can only be proved by writ or oath.

2. *Causes of Discharge.*—(a) By consent of parties, without any consideration having passed. This is called acceptance, and may be not only expressed but implied, as in the case quoted by Erskine (iii. 4. 8): “Acceptance by a *negotiorum gestor* “of a discharge of intromissions from him whose affairs he had “undertaken the management of, upon a clearance in which no “article was stated for salary, was adjudged to imply a passing “from his claim of salary, supposing salary had been truly due.” (*Graham*, 1683, M. 6534.)

(b) A contract may be discharged by a substituted contract, either by way of new terms which are intended to supersede the old, or by way of a new party who is intended to take the place of the old. The first is called novation, the second delegation. There is a presumption against novation and in favour of corroboration. Thus, if a landlord takes a bill from his tenant for rent, he is not thereby changing the contract of lease, with its legal incidents, into a mere personal contract. If the bill be dishonoured he may fall back upon his remedies as a landlord.

Delegation may be either expressed or implied. Questions of implied delegation arise when an insurance company sells its business to another which takes over its policies. The policy

holder receives notice of the change, and pays his premiums for a number of years to the new company, but gives no written consent. The new company fails, and he then attempts to fall back upon the old company. Numerous questions of this kind arose out of the bankruptcy of the Albert Insurance Company and the European Assurance Association in 1870 and 1876. The decisions are conflicting, and depend upon the special circumstances of each case. There is always a presumption against delegation. The question has frequently arisen in the contract of stockbroking. Between one settlement day and another, numerous sales of the same lot of stock may take place. The name of the ultimate purchaser is given to the first seller, and all the intermediate parties are dropped out. If no objection be taken to the name and he be accepted as purchaser, the first purchaser is freed. These decisions depend upon the rules of the Stock Exchange, which are acted upon by the Court if they are reasonable.

(c) A contract may contain within itself provisions for its discharge on the non-fulfilment of a condition, or on the occurrence of a certain event. Thus the contract of carriage lays upon a common carrier, under the edict *nautæ, caruones, stabularii*, an absolute liability for the safe carriage and delivery of the goods, subject always to the exception of natural and inevitable accident, the act of God, and the Queen's enemies. The occurrence of one of these exceptions discharges the liability under the contract.

(d) A contract may be discharged by performance on the one hand, and by payment on the other. Payment must be made to the proper person. If the debtor has received notice of an assignation, or if an arrestment has been put into his hands, or if he is aware of the sequestration of the creditor, he is no longer in safety to pay to him. In the case of periodical payments, such as rents and feu-duties, payments *ante diem* will not protect the debtor in a question with an arrester, or a purchaser, or a bondholder entering into possession (Erskine iii. 4. 4); but in a question with the trustee in the creditor's bankruptcy, who takes only *tantum et tale*, the result is otherwise. (*Davidson v. Boyd*, 1868, 7 M. 77.)

A tender of performance or of payment is sometimes of great importance. Thus, if the seller of goods duly tender delivery

and it is refused, he is discharged from the contract, and may sue for damages. If the debtor in a money obligation duly tender the money, and continue ready to pay it, he cannot be made liable in the expenses of an action for its recovery. In England the tender in an action must be accompanied by payment of the money into Court. (*Dixon v. Clarke*, 1848, 5 C.B. 365.) This is a wholesome rule, and might with advantage be followed in Scotland.

(e) A breach of contract by one party will sometimes discharge the other of performance of his part, and in all cases will give him a new right—i.e., to sue for damages.

Suppose that before the time for performance has arrived the one intimate to the other that he resiles from the contract, the other has two courses open to him—according, at all events, to the English law. He may either treat the contract as broken, and sue at once for damages; or he may hold by the contract, and insist for performance at the proper time. If he take the latter course, the contract remains in existence for both parties. In the case of *Warin & Craven v. Forrester*, 1876, 4 R. 190, an action of damages for refusal to take delivery of goods sold, the Lord President said, “Re-sale is the only proper remedy for “parties in the position of the pursuer to adopt.” In the subsequent case of *Thomson Brothers v. Thomson*, 1885, 13 R. 88, the facts were that the pursuers had stored the goods, and brought their action for the price. The Sheriff-Substitute dismissed the action, on the ground that the pursuers had not taken the proper remedy; but that judgment was recalled by the Second Division, who allowed a proof, and thereafter decided the case on the merits. We may, therefore, take it to be the law in Scotland that in an executory contract of sale, if the buyer refuse to take delivery, the preferable course is for the seller at once to re-sell and claim the difference of price as damages, but that he may, in his option, store the goods and sue for the price of them. Suppose that in a contract for the periodical supply of goods the purchaser, after receiving and paying for part, gives notice that he requires no more, the seller may, without tendering any farther supplies, at once bring an action for breach of contract. (*Cort v. Ambergate Railway Company*, 1851, 17 Q.B. 127.)

So far there is no difficulty. But when we get into the region of partial breach of contract, there are some nice meta-

physical distinctions drawn in the English decisions. The general rule is that where the promise of the first party is conditional upon the performance of the promise of the second party, then a breach of the latter promise discharges the first party. The promises are said to be dependent on each other. Where the one promise is not conditional upon the performance of the other, the breach by the one does not set the other free from the contract, but only gives him a right to claim damages. The rules are very well summarized by Lord Mansfield in the case of *Kingston v. Preston* 1773, cited in *Jones v. Barkley*, 2 Douglas 689. He says, "There are three kinds of covenants, "1st, Such as are called mutual and independent, where either "party may recover damages from the other for the injury he "may have received by a breach of the covenant in his favour, "and where it is no excuse for the defendant to allege a breach "of the covenants on the part of the plaintiff; (2) There are "covenants which are conditions and dependent, in which the "performance of one depends on the prior performance of "another; and therefore, till this prior condition is performed, "the other party is not liable to an action on his covenant. "(3) There is also a third sort of covenants, which are mutual "conditions to be performed at the same time; and in these, if "one party was ready and offered to perform his part, and the "other neglected or refused to perform his, he who was ready "and offered has fulfilled his engagement, and may maintain "an action for the default of the other, though it is not certain "that either is obliged to do the first act. The dependence or "independence of covenants is to be culled from the evident "sense and meaning of the parties, and that however transposed "they may be in the deeds, their precedency must depend on the "order of time in which the intent of the transaction requires "their performance."

The general rule in modern times is that promises, each of which forms the whole consideration for the other, will not be held to be independent of one another.

In contracts for the sale of goods in which delivery and payment are to be made by instalments, the question often arises whether the refusal of the purchaser to accept of one instalment, or his failure to make one due payment for one instalment, entitles the seller to rescind the entire contract, or

only gives him a right to claim damages. In Scotland the general rule is that failure as to one instalment will give a right to rescind the contract. (*Turnbull v. McLean & Co.*, 1874, 1 R. 730.) In England the decisions have been very conflicting, and can scarcely be reconciled; but the last case on the subject is in accordance with the rule in Scotland. (*Honck v. Müller*, 1881, 7 Q.B.D. 92.)

If the promise that has been broken is of a subsidiary character, not going to the root of the contract, but whose breach may be compensated by damages, then the contract will not be rescinded. Thus, in a charter party, a promise that the ship shall sail with all convenient speed is subsidiary only (*M'Andrew v. Chapple*, 1866, 1 C.P. 643); but if the shipowner states that the ship is then in a certain port, when she is not, the breach goes to the root of the contract, and the charterer may refuse to load. (*Behn v. Burness*, 1863, 3 B. & S. 751.)

The conditions that may occur in contracts have been divided into precedent, concurrent, and subsequent. A precedent or suspensive condition is one which must exist before the right to enforce the contract arises. A contract to satisfaction is of this class,—where the one party stipulates that the work to be done or the goods to be supplied are to be to the satisfaction of a third person, or of the party to the contract. Until this condition is purified, the right to payment does not arise (*Clarke v. Watson*, 1865, 18 C.B.N.S. 278), unless there is collusion between the third person and the party liable, in which case the condition is held as purified. (Erskine iii. 3. 85., D.L., 17, 161.) In an insurance contract, a stipulation for proof satisfactory to the directors is complied with by the production of reasonable proof. (*Braunstein v. Accidental Death Insurance Co.*, 1861, 1 B. & S. 702.—See the American cases collected in 24 J. of J. 414.)

A concurrent condition in a contract exists where both parts must be performed at the same time, as in a sale of goods for cash. Each must be ready to perform his part at the same time. A contract for payment of “cash on completion of order” means payment of cash on delivery of the goods at the place stipulated in the contract, and not payment when the goods are made and ready for transmission. (*Siemens v. Mitchell*, 1885, 2 Sh.C. Rep. 9.)

A condition subsequent, or a resolute condition, is one upon the occurrence of which the contract is discharged. Thus, in the contract of marine insurance there is an implied condition that the ship shall not deviate from her course, unless through stress of weather or to save life. If this condition is broken, the contract at once flies off.

Remedies for Breach of Contract.—A person who is injured by a breach of contract may in certain cases ask for specific performance, and in all cases he may ask for the remedy of damages. In contracts for the purchase of land, and in certain contracts for the delivery of a specific object, or for performance of a specific act, the Court will give decree *ad factum præstandum* and enforce the decree by warrant of imprisonment. Where the contract to be performed involves a series of acts and the need of supervision, the Court will not, as a general rule, order performance by the defaulter, but will leave the injured party to his remedy in damages. (*Glasgow Steamboat Co. v. Henderson*, 1877, 21 Jour. Jur. 464.) Nor will a contract for personal services (*e.g.*, to sing at a theatre) be so enforced, although a negative term in the contract (*e.g.*, to sing nowhere else during a certain period) will be enforced by interdict. (*Lumley v. Wagner*, 1851, 1 D., M., and G. 604.)

Damages are the universal solvent. Mr. Justice Holmes says, speaking of specific performance, "The only universal consequence of a legally binding promise is that the law makes the promiser pay damages if the promised event does not come to pass. In every case it leaves him free from interference until the time for fulfilment has gone by, and therefore free to break his contract if he chooses." (The Common Law, p. 301.)

In assessing damages the Court, acting as a jury, fixes such a sum as the parties may fairly be supposed to have had in view as the result of a breach of contract. Notice at making the contract, of any particular consequence that would result from the breach will be sufficient to make the party in default liable in special damage if he can fairly be supposed to have accepted the contract with the special condition attached to it. (*Horne v. Midland Railway Co.*, 1873, 8 C.P. 131; *McKenzie v. Liddell*, 1883, 10 R. 705.)

Special damages were allowed where a farmer purchased a cow with a warranty of soundness, and it proved to be afflicted

with foot-and-mouth disease, and infected all his other cows. The ground of liability was that the seller knew the purchaser to be a farmer, and that he would probably place the infected cow with others. (*Smith v. Green*, 1879, 1 C.P.D. 92.) Damages for delay in performance may be set off against a claim for the contract price, where a time for performance is stipulated. Where no time is stipulated a separate action of damages for undue delay must be raised. (*McBride v. Hamilton*, 1875, 2 R. 775; *Webster v. Cramond Iron Co*, 1875, 2 R. 752.)

A claim of damages for a single breach of contract cannot be split up, but must be brought once for all, including both past and future damages. (*Stevenson v. Pontifex & Wood*, 1887, 15 R. 625.)

The parties sometimes fix for themselves in the contract the amount of damages to be paid in the event of a breach; but even when they declare them to be "liquidated damages" and not "penalty," the Court exercises its equitable jurisdiction in modifying the amount. (*Forrest & Barr v. Henderson*, 1869, 8 M. 187.)

(f) A contract may be discharged by supervening impossibility of performance.

Thus, where performance becomes impossible in consequence of a change in the law of our own country. (*Baily v. De Crespigny*, 1869, L.R. 4 Q.B. 180.) But a change in the law of a foreign country will not have this effect, for the parties might have protected themselves against this contingency. (*Barker v. Hodgson*, 1814, 3 M. and S. 267.)

Where the parties have in contemplation the continued existence or fitness of a specific person or thing, then the failure of the subject matter of the contract will excuse performance. So, where potatoes were sold to be grown on a certain field, and there was a failure of the crop through disease, performance was excused. (*Howell v. Coupland*, 1876, 1 Q.B.D. 258.) So, if a house be burned during a contract of lease, both parties are excused, herein differing from the English law, which holds the tenant still liable for the rent, on the ground that he ought to have provided against this event by his contract. (*Paradine v. Jane*, Ayleyn 26.) So, where a famous pianoforte player was prevented by dangerous illness from playing at a concert, it was held that no damages were due "as for breach of contract." (*Robinson v. Davison*, 1871, L.R., 6 Ex. 269.)

IV. JUDICIAL INTERPRETATION OF CONTRACT.

If unfortunately a contract becomes the subject of litigation, there are certain rules of evidence and of construction by which the Court is guided. We can do no more than mention some of these.

A leading rule is that where the contract is in writing, it cannot be varied by evidence of prior communings. (*Inglis v. Buttery & Co.*, 1877, 5 R. H.L. 87.)

Where, however, you have agreements entered into at the same time as, or subsequent to, the written contract, evidence of these will sometimes be allowed, not to vary but to complete the written contract. In mercantile contracts terms and phrases are sometimes used which require evidence to explain their meaning and application to the subject matter of the contract. So, evidence was allowed in a case against underwriters to prove that the word "sea worthy" was used in a restricted sense as applied to a vessel sent out for river navigation upon the Indus. (*Burges v. Wickman*, 1863, 3 B. and S. 669.) As Blackburn J. said, "Seaworthiness is a term relative to the nature of the adventure. It is to be understood not *simpliciter*, but "*secundum quid*."

Evidence of the usage of a particular trade or of a particular locality is generally admissible, so long as the usage does not contradict the general law of the land. Thus, in construing a charter party or policy of marine insurance, evidence as to the limits of a port, and as to the custom of a port, is frequently allowed. (*Owners of "Afton" v. Northern Marine Insurance Co.*, 1887, 14 R. 544; *Hillstrom v. Gibson & Clark*, 1870, 8 M. 463.) In one case evidence was allowed that, by the usage of the locality, 1000 rabbits meant 1200. (*Smith v. Wilson*, 1832, 3 B. and Ad. 728.)

Our Courts have never gone the length of attempting the rectification or re-forming of a written contract or deed, as the Chancery Division of the High Court of Justice in England does.

In construing a written contract words are generally to be understood in their plain and literal meaning, subject to the qualification that the Court will try to ascertain the intention of the parties from the whole of the agreement. Words of general meaning are limited by words of special meaning with

which they are found in collocation. This is called the rule *ejusdem generis*. A word susceptible of two meanings will receive that most in consonance with the apparent meaning of the contract. In cases of doubt the Court will construe ambiguous expressions against the interest of the person who used them. This is called the rule of construction *contra proferentem*.

As conveyancers, you will by-and-bye be called upon to prepare contracts of various kinds for your clients, and it is very important that you should cultivate a plain, direct, and unambiguous style in your legal compositions. Some very valuable rules on this subject are to be found in Sheriff Mackay's essays on Legal Composition, 3 *Law Quarterly Review* 326, and 32 J. of J. 169.

LECTURE IV.

SUPERIOR AND VASSAL.

CONTENTS.—Introductory—The Feudal System—Origin of the tenure of feu-farm—Its relation to (a) the Feudal System, and (b) the Roman Contract of *Emphyteusis*—Gradual development and existing form of tenure—Obligation to pay feu-duty of (a) vassal, and (b) sub-vassal—Superior's remedies for recovery (1) by personal action against (a) the vassal, (b) the sub-vassal; (2) by real diligence against the lands; and (3) by irritating the feu *ob non solutum canonem*—Effect of irritancy on sub-feus—Recent decisions.

THE study of history has always been deemed a valuable element in the education of lawyers. As such it possesses a twofold utility. It has, in the first place, what might be called its subjective uses—that is to say, it is an instrument of intellectual culture probably as efficient as any of the liberal arts. It accustoms the mind to apprehend, analyse, and arrange series and bundles of facts more or less detailed, besides demanding from the student the faculty of applying the laws of evidence to circumstantial issues. Nowhere so readily as in the prosecution of historical studies can the lawyer acquire the peculiar culture of the mind he stands in need of—a sort of broad, intellectual sympathy in harmony with a somewhat narrow contemplation of small details and technicalities. History also furnishes an endless series of unsettled controversies round which conflicts have raged as fierce and loud as any between embattled hosts. What better field can there exist than the literature of historic controversy for the sharpening of those intellectual faculties which are so essentially necessary in what is perhaps the most difficult part of a lawyer's work?

But besides this subjective and personal utility, history occupies an all-important place in the lawyer's education for another and still more essential reason. Everyone knows, no matter how new he is to legal study, how closely the law of this

country is bound up with its history. It is impossible to acquire anything like a comprehensive and accurate knowledge of our law as it is in force at the present day without tracing, in greater or less detail, its external history; and this, again, can only be done effectually in the light of the political and social history of the periods in which the law was originated or developed. Law and history have a reflex action on one another; and just as the historian cannot fully understand an epoch without some acquaintance with its laws, neither can the lawyer thoroughly grasp a legal doctrine or enactment without knowing something of the historical conditions which gave it birth or which have shaped its development. Much of the obscurity which may becloud any particular doctrine of our law is readily dissipated when its external history is traced through, it may be, successive centuries, and when it is shown how it has been moulded by the social or political circumstances of different times. This may be called the objective utility of historical studies, which, viewed from the standpoint of legal education, thus possess a twofold value; and students of law cannot be too strongly recommended to acquire some degree of familiarity with the facts of history both in its social and political aspects, and more especially with the history of our own country. In the study of Scottish history there is no better guide than the late Professor Cosmo Innes, whose books possess a charm which will of itself create a taste for historical study, and form an excellent introduction to that aspect of history most closely allied to legal pursuits.

The Relationship of Superior and Vassal is a subject which, more than any other branch of our law, is woven into the texture of our social, political, and national history; and it therefore lends itself the more readily to historical treatment and the more clearly illustrates the value, in its double aspect, of historical studies.

No student can look into the existing system of land tenure in this country without being confronted at the threshold with its historical element. He will find that, in order to understand its salient features, and still more to trace its development, he must study the feudal system, and that not merely in the somewhat narrow sense in which that expression

is used by Scottish conveyancers, but in its broader aspects as a department of the social and political history of many of the European nations, and particularly of our own country. Whatever view may be taken of the precise relationship of our existing tenure to the feudal system in the historic sense,—whether the one is a direct development of the other, or whether an independent tenure, engrafted on feudal usages, has gradually superseded them (a problem as to which something will be said presently),—it is clear that the survival in the system of land rights of feudal terminology, if for no other reason, renders an acquaintance with historic feudalism an absolute necessity.

It may be taken for granted that students of law know generally what the feudal system was, and what part it played in the history of modern Europe. Though intimately connected with the holding of land, it was not primarily or essentially a system of land tenure, but a social system. The king or leader, in theory and also by virtue of those physical and moral qualities which gave him rule, possessed all the land; he parcelled it out in return for homage and military service to his immediate followers, and these again distributed portions of it on the same conditions amongst others who occupied lower ranks in the tribe or community. This system, which embraced every aspect of primitive social life, and which bound all within the community by a chain of adamant, had its birth just as the Dark Ages began to obscure the ancient civilisation of Rome. The tribes which swept down from the north of Europe on the downfall of the Roman Empire were held together by the feudal economy, and it is supposed the system had its origin amongst them. Feudalism has no parallel in the history of Rome. Whatever similarity there may be between some of the Roman tenures of land and certain of the later developments of feudalism, it was no part of the policy of the Roman people at any period of their history to make the holding of land the basis of national security. The mere tenure of land was never elevated into a social system.

Feudalism was introduced into England and Scotland during the eleventh century. In the former country the Normans used it to supplant the Anglo-Saxon tenures, and in our own country it superseded the ancient Celtic tenures through the Normanising influences which set in about Malcolm Canmore's

time. From this period down to the middle of the eighteenth century it continued in Scotland to be a powerful social system based on the possession of land, and all know how prominently it figures in every page of our national history. When it was introduced towards the close of the eleventh century, the king became by feudal theory lord paramount of the whole soil of the country. He gave out grants to nobles for homage and service in war, and these in turn made subordinate grants to men of lesser rank for similar considerations, and so on indefinitely. This process of granting subaltern rights, or "sub-infeudation" as it was called, was an essential feature of the system all through its Scottish development, though in England it was discarded by statute at an early period. The nomenclature of feudalism very distinctly proclaims its social significance—superior, the overlord who makes the grant; vassal (*vassalus* = social inferior), the person who humbly receives it, and who owes not merely military service therefor but fealty, obedience, and reverence. That these terms have come down to the present day to designate the parties concerned in the ownership of land under what is, strictly speaking, a different tenure, shows the powerful hold feudalism had upon our country, and the extent to which it has imparted a complexion to the existing tenures of land.

Besides serving his superior in war and rendering him all homage and reverence, the vassal had to face certain incidents in the feudal relationship which still further marked the system as bound up with the very structure of society. These were called *casualties*, a word still surviving in our modern tenure to denote certain obligations incident to the contract of feu. If the vassal alienated more than one-half of the lands without the superior's consent his right was forfeited. This was called the casualty of *recognition*. When the vassal died his heir had to pay a fine to the superior in order to secure admission, and if there should be no heir the lands returned to the superior. This was the casualty of *relief*. By virtue of the casualty of *ward* the superior had, during the minority of the vassal, the guardianship of his person, as well as possession of the lands, which he held for his own profit. The casualty of *marriage* led to serious consequences. Sir George Mackenzie thus quaintly describes it :—

"If the vassal who holds ward lands dies leaving an heir unmarried, whether minor or major, the superior gets the value of his tocher though he offer him not a woman to be his wife; but if the superior offer him his equal for a wife and he refuses to accept her and marries any other person, the superior gets the double of his tocher, and one of these casualties is called the *single avail of the marriage*, and the other the *double avail of the marriage*;" and he adds, "It is thought that the reason why this casualty is due was because it was not just that the vassal should bring in a stranger to be mistress of the feu without the superior's consent, for else he might choose a wife out of a family that were an enemy of the superior; but I rather think that both *ward* and *marriage* proceeded from an express paction betwixt King Malcolm Canmore and his subjects when he first feued out the whole lands of Scotland amongst them, as is to be seen in the first of his statutes."¹

Those incidents or casualties which belonged to what was called ward holding—the only proper tenure of feudalism—remained to the last an essential feature of the feudal system, and only disappeared when every distinctive element of that system was destroyed, not a century and a half ago. Feudalism and civilization could not flourish side by side. The peaceful and civilizing arts were neglected so long as it held undisputed sway. Mr. Ramsay, of Ochtertyre, in his interesting work on the social condition of our country a century ago,² describes the condition of vassals under the clan system immediately before the last Jacobite rebellion, and tells how the male clansmen left the tillage of the ground to the women, thinking all labour degrading but that of warfare. This picture of feudal civilisation in the middle of last century is a contemporary one; but it might almost serve to describe the social life of feudalism when it first appears in authentic history. An elegant writer on the history of the Feudal System thus speaks of the barbarian hordes which overran Europe on the downfall of the Roman empire—"They knew neither the name nor the use of autumn, for they disregarded agriculture, leaving it to the females and infirm, and holding

¹ Inst. ii. 5, 10.

² "Scotland and Scotsmen in the Eighteenth Century," vol. ii., p. 408.

“it inglorious to secure by sweat the livelihood they could gain “by blood.”¹ These companion pictures—ten centuries apart in the gallery of history—exhibit the unity of feudalism in its resistance to civilisation.

It is interesting to observe that, while feudalism spread throughout the countries of Europe coeval with the decline of the learning and civilization of Rome, it in turn began to lose its power and be supplanted by other systems of tenure as the ancient learning revived. It may be taken for granted that the introduction of the feudal system into Scotland was a gradual process, and that we are indebted to the inventive genius of the mediæval historians for the picturesque description of King Malcolm feuing out by one solemn act his whole kingdom, reserving only as a place of royal coronation the Moot Hill of the town of Scone. The King Malcolm of this mythical story was not Malcolm Canmore, as stated by Sir George Mackenzie, but Malcolm II., to whom the fabulous collection of laws known as the *Leges Malcolmi* is attributed. Professor Cosmo Innes thus describes the gradual feudalizing of early Scottish tenures:—“Some of “the old MSS. which used to be cited in Court by the “Scotch lawyers, before the great work of Stair had banished “such myths, have a capitular styled ‘The Laws of Malcolm “‘M’Kenneth,’ which commences thus—‘Here follow the laws “‘of Malcolm M’Kenneth, the whilk was maist victorious “‘king over all the nations of England, Wales, Ireland, and “‘Norway. And he gaif all the land of the kinrik of Scotland “‘till his men, and nocht held till himself but the kingis dignitie “‘and the Mute Hill in the town of Scone.’ Sir John Skene, the “first editor of our old laws, sets himself to prove that chapter “to be the authentic enactment of Malcolm II., who began to “reign in 1004, drawing his proofs out of recent Acts of Parlia- “ment, corroborated by the historical authority of Hector Boece! “It is not necessary to controvert his assertion, and to prove “that there never can have been a time when all the land “belonged to the sovereign. The story was introduced evidently “to support a law fiction,—convenient in itself, and the basis of “our system of conveyancing,—that all property flows from the “Crown. Such was the form of conveyancing undoubtedly

¹ Professor Menzies’ “Lectures on Conveyancing,” p. 505.

“from the earliest of our charter history; and it could not have been more systematically feudal if the country had really been conquered, the natives driven out or enslaved, and the invader, now sovereign, had proceeded to partition the territory among his victorious army. That many of those early charters which we still have of Malcolm IV. and William the Lion were really new grants of land fallen to the Crown by reason of forfeiture or otherwise, we have every reason to believe; but many others of them were, beyond all doubt, a mere formalizing of the tenure—grants, according to the fashionable feudal manner, of property already held by the grantee.”¹ It is abundantly clear that by the 12th century feudalism had gained undisputed dominion both as a social polity and as a system whereby practically the whole land of the country was held. This continued till the 15th century, when the feudal spirit began to show symptoms of waning. The long dark night of mediævalism was beginning to give place to the first streaks of dawn. The ancient learning was reviving, and the jurisprudence of Rome was already doing something to humanize our legal system. The civilizing art of husbandry was gaining ground, and demanded another tenure for its further development. With the middle of the century a new era set in. James II., who met an untimely fate in his thirtieth year while conducting the siege of Roxburgh Castle, had then reached early manhood, and was inaugurating a wise and beneficent rule. In 1449 the famous statute was passed protecting tenants (“the *puir people that labouris the ground*”), holding under a lease for a definite period, from eviction at the instance of singular successors where the lands were alienated during the currency of the lease.² It is by virtue of this statute and of the decisions which have followed on it that the principle just stated is the law of Scotland to this day.³ But eight years later, in the same beneficent reign, began a new epoch which ultimately changed the whole land tenure of Scotland. The year 1457, during which the 14th Parliament of James II. assembled, was a remarkable one in the history of Scottish legislation. Measures were devised against “masterful persons” who seized other men’s lands by

¹ “Scotland in the Middle Ages,” p. 203. ² 1449, c. 17.

³ Rankine’s *Law of Leases*, p. 119, and the authorities there cited.

force; barons and simple freeholders were enjoined to attend the king's circuit courts with sobriety, laying aside their warlike weapons; "masterful beggars," "itinerant bards," and "feigned fools" were to be got rid of; agriculture was encouraged by commanding every man possessed of a plough and eight oxen to sow each year a firloft of wheat, half a firloft of pease, and forty beans, under pecuniary penalties; provision was made for the planting of trees and hedges, and the sowing of broom, and new regulations were passed for the more effective destruction of the wolf, then a great enemy of the husbandman. But all these beneficent measures are insignificant in comparison with the Act of the same Parliament¹ whereby, on the old feudal tenure of landed property, was engrafted a new system expressly devised for the encouragement of husbandry. This new system was called the tenure of "feu-farm," and the Act was designated as being "anent few-ferme." What we would call now-a-days the preamble set forth that it was granted "for the better cultivating and labouring of the kingdom," and it enacted that the king would allow all his vassals to set their lands in feu-farm for a just duty or "avail," and it was declared that the statute was to be equivalent to a confirmation by the king of the subaltern right. The object of this statutory confirmation was to protect the sub-vassal or sub-feuar, as he was more correctly designated, from forfeiture on the default or rebellion of his superior. Although this Act was confined in its operation to sub-feus granted by the immediate vassals of the Crown, vassals of subject superiors assumed the same privilege; and nearly fifty years afterwards, in the reign of James IV., when the legality of such sub-feus was questioned, another statute² was passed declaring it to be lawful for the king, his prelates, nobles, and landholders to set their lands in feu. The legislative sanction of the system of feu-farm holdings underwent many vicissitudes during the 16th and 17th centuries so far as regards the protection afforded to the sub-feuar from the consequences of the superior's forfeiture; but at the Revolution such protection was made a permanent feature of our landed system.³

This tenure of feu-farm should be regarded less as a development or modification of the feudal system than as essentially a

¹ 1457, c. 71. ² 1503, c. 91. ³ 1690, c. 33.

separate and independent tenure. It has come down to us with a sort of hall-mark of feudalism, because the Scottish lawyers of the 15th and 16th centuries chose to clothe their new system in a feudal dress by applying to it feudal names and principles. It would not be difficult to show that the tenure was borrowed from the Roman contract of *emphyteusis*, whereby "a proprietor "gives over to another a real right to land, generally in perpetuity, in consideration of a certain annual return in money or "produce."¹ The granter of the right, or superior as the feudalists called him, was in the Roman law known as the *dominus* and the feuar as the *emphyteuta*. The *emphyteuta*—where the grant was perpetual—had in theory as absolute a right of property as a feuar; and if he alienated the lands to a stranger he had to pay to the *dominus* a fine called *laudemium*, which under Justinian's Code, was fixed at the fiftieth part of the price or value of the lands, being thus tolerably near the amount of the modern composition. Indeed there was nothing in any of the casualties of the feudal system so nearly analogous to our composition as the Roman *laudemium*, and it is more truly the prototype of that payment than the incidental obligations of the feudal vassal.

The composition of a year's rent as one of the incidental payments under the feu-farm tenure was introduced by statute twelve years after the tenure itself received legislative sanction. The superior was not obliged to recognise purchasers who had acquired feus from vassals, and the privilege of compelling recognition was, by a statute passed in 1469, conferred on creditors apprising the feu for debt, but only on payment of a year's rent as a fine.² It may well be assumed that the idea of the composition was borrowed from the Roman *laudemium*, though it was at first confined in its operation to a limited class. It was, however, gradually extended by statute, in the first place to other classes of persons who had acquired the vassal's land in the capacity of

¹ Lord Mackenzie's "Studies in Roman Law," 4th edition, p. 191. Sir George Mackenzie, in his "Observations" on the Act of 1457, (p. 53), says that a sub-feu—that is, a holding in feu-farm—is nothing but *emphyteusis*; but in his "Institutes," (ii. 4, 6), he indicates that they are analogous though not identical, an inconsistency by no means uncommon in that eminent lawyer's two great works.

² 1469, c. 36. This statute is still referred to as defining the measure of the composition.

creditors,¹ and ultimately to all purchasers and disponees. The admission of disponees generally was not effected till the final extinction of feudalism after the last Jacobite rebellion.²

But still more light is thrown on the Roman origin of the feu-farm holding by tracing its progress during the first century and a half after its institution. It is a curious thing that it did not develop on feudal lines except in its outward form, but continued to borrow from the civil law. It is perfectly clear that the Scottish lawyers who directed the course of legislation during the 15th and 16th centuries were well acquainted with the law of Rome, which by this time was firmly established as a branch of learning in the great seminaries of Europe. After the establishment of the tenure of feu-farm, a practice seems to have been introduced of inserting in charters clauses declaring that the right would be annulled if the feu-duty remained unpaid for two years, and this irritancy received statutory sanction in 1597.³ There was of course no parallel to this in the feudal system, because there was no fixed annual duty payable either in money or produce; but there was such a provision in the contract of *emphyteusis* under Justinian's legislation. The Roman origin of the Scottish irritancy was expressly acknowledged in the statute; and the phrase describing it—*ob non solutum canonem*—was borrowed from the canon law.⁴

The tenure of feu-farm was thus in its substance more Roman than feudal; and had the Scottish lawyers who imported it from the civil law also brought with it its terminology the probability is that the tenure would have come down to us shorn of a good deal of those feudal trappings which impeded its progress as a serviceable system. Had the granter of the feu right been called the *dominus* instead of the *superior*, and the

¹ 1672, c. 19; 1681, c. 17.

² 20 Geo. II. c. 50. This statute only compelled superiors to enter singular successors by resignation. The latter could not demand an entry by confirmation till the passing of the Lands Transference Act of 1847 (10 & 11 Vict. c. 48).

³ 1597, c. 250. By this statute it was ordained that if any vassal or feuar holding lands in feu-farm of the Sovereign or of a subject superior "failzie in making of payment of his few dewtie . . . be the space of two yieres haill and togedder they sall amitte and tine their said few of their saids lands conforme to the civil and cannon law sicklike and in the same manner as gif any clause irritant were specially ingrossed and insert in their said infetmentis of few-ferme."

⁴ Decretals (3, 18, 4).

grantee the *emphyteuta* instead of the *vassal*, the tenure might in its after development have possibly kept clear of those feudal complications which modern legislation has only partially remedied. But such terms were foreign to Scottish ears, and feudalism was still powerful. While the new tenure was yet in its infancy superiors who adopted it endeavoured in some cases to bring it within the sweep of the feudal economy, and make it subserve the ends of feudal ambition. They tried to engraft on it the feudal *casualty of marriage*, by making the grants *cum maritagio*,¹ and to stipulate in addition to the feu-duty for a variety of personal services. All this was foreign to the genius of the feu-farm system, as it was of the Roman contract of *emphyteusis*; but while grants *cum maritagio* soon disappeared, the stipulation for personal services and reverential acknowledgment of the superior's dignity continued a somewhat familiar feature down even to modern times. Exaction of personal services, except those relating to the tillage of land, was abolished after the Jacobite rebellion of 1715;² but the practice has continued down almost to our own day of inserting in charters antiquated provisions about attending head courts and performing other meaningless acts.

Those personal services which were not so abolished form the subject of a provision in the Conveyancing Act of 1874. Where carriages and services exigible by the superior have been commuted to an annual money payment by agreement, either written or verbal, and either express or implied from the conduct of parties, and where such commutation has been acted on for five years, the superior is bound to accept the money payment in lieu of the services in all time coming. Where there has been no such commutation, the Sheriff has power, on the application of either party, to fix the annual value of the services which the superior is bound to accept instead of exacting performance.³

It need only further be mentioned that the distinctive tenure of feudalism—ward-holding—was, at the close of the last Jacobite rebellion, abolished along with heritable jurisdictions.⁴ In the latter days of the system a practice had prevailed of substituting for the military services which had to be rendered to the

¹ Sir George Mackenzie's Institutes, ii. 5, 11. ² 1 Geo. I. c. 54.

³ 37 & 38 Vict. c. 94, sec. 20. ⁴ 20 Geo. II. c. 43, 50.

superior, fixed money payments called *taxed ward*, and this in 1748 was converted into proper feu-duty. Those who held of the Crown had their tenure converted into a blench-holding with a merely nominal duty; and in the case of those who were under subject superiors, the feu-duty was fixed by the Court of Session.

The essential feature of the feu-farm tenure is the payment of a stipulated duty. The liability for this payment is of a two-fold character. There is first the personal obligation of the vassal, and, secondly, the liability of the lands. The personal obligation of the vassal, whether he is the original feuar or a successor who has acquired the lands, really rests upon contract. The original feuar binds himself and his successors to pay the stipulated duty. So long as he remains in the contract, or, to adopt feudal language, so long as he remains vassal, this personal liability continues; and when he ousts himself from the contract by bringing another into it,—or, again, to give the principle a feudal dress, when he alienates the lands to one who completes his vassalage according to the rules of feudal conveyancing,—the personal obligation of the original feuar ceases, and that of his successor begins. Under the law as it stood prior to 1874, the vassal remained personally liable after he had sold the lands until the purchaser was duly entered with the superior, because until this entry took place the relationship between superior and vassal was not complete, or, in other words, there was no contractual tie between the superior and the new owner of the lands. Since 1874 infettment implies entry, and consequently the statute of that year provided that the vassal, in order to relieve himself of personal responsibility for the feu-duty, must notify the change of ownership to the superior.¹ An original feuar may, however, continue to be personally bound for the feu-duty along with his heirs, executors, and representatives, even after the lands have been conveyed and the successor's personal obligation has commenced where in the charter or contract of feu, or in a separate collateral deed, there is a provision binding the feuar and his heirs, executors, and successors to pay the feu-duty jointly and severally.² The obligation

¹ Conveyancing Act, 1874, sec. 4, sub-sec. (2).

² *King's College of Aberdeen v. Lady James Hay*, August 11, 1854, 1 Macq. 526; *Police Commissioners of Dundee v. Straton*, Feb. 22, 1884, 11 R. 586.

must be expressly made "joint and several" in order to have this effect. The method available to the superior in enforcing the vassal's personal obligation is, of course, a direct action against him.

The superior can proceed by direct personal action for recovery of the feu-duty against a sub-vassal who owns the whole of the original feu, but he cannot sue the sub-vassal in a part of the feu for the whole of the feu-duty. Where an original feu has been parcelled out among a number of sub-feuars, the personal liability of each sub-feuar to the over-superior extends to the proportion which his sub-feu bears to the whole, and not merely to what the sub-feuar has stipulated in his charter to pay to his immediate superior. It may be that the part of the original feu held by the sub-vassal has been feued for a merely nominal duty; but no such arrangement between the vassal and sub-vassal will interfere with the over-superior's remedy against the sub-vassal by means of a personal action for a rateable proportion of the original feu-duty. Suppose, however, the sub-vassal is taken bound in the sub-feu right to pay to his immediate superior *more* than a rateable proportion of the original feu-duty, the over-superior is entitled to recover this sub-feu-duty by a personal action directed against the sub-vassal—that is, of course, if his original feu-duty remains unpaid. The principle of law which gives this remedy to the over-superior is that there is between the over-superior and the sub-vassal a privity of contract, whereby he can sue for fulfilment of an inherent condition of the sub-vassal's right.¹

But not only is the vassal personally bound to pay the stipulated feu-duty, but the lands themselves are liable. The feu-duty is a *debitum fundi*. Every part of the ground feued is available to the superior to enable him to operate payment of the debt, and that whether the lands are in the possession of the original feuar or a successor, or in the possession of a sub-feuar who may hold of the original feuar for payment of a sub-feu-duty. Though the superior is to some extent limited in his remedy of a personal action against sub-vassals, he is under no such restriction in proceeding against the lands themselves

¹ See Lord President Inglis' judgment in *Marquis of Tweeddale's Trustees v Earl of Haddington*, Feb. 25, 1880, 7 R. 627; also, *Sandeman v Scottish Property Investment Co.*, June 8, 1881, 8 R. 790.

when these are in the possession of sub-vassals. He can, by means of real diligence, take payment of the whole feu-duty out of a part of the original feu held by a sub-vassal. In operating his remedy the superior is entitled to disregard the sub-feuar's rights, even though the latter has duly paid the sub-feu-duty to the person who feued to him.¹ Several processes are open to the superior in enforcing his remedy against the lands. He may execute a poiding of the ground, for the purpose of attaching the moveables. Poiding of the ground, however, is only available to the superior so long as his superiority remains in his person undivested. If he should alienate the superiority, leaving feu-duties in arrear, he cannot, after he is so divested of his real right, pursue a poiding of the ground, though, of course, his remedy of a personal action is still open to him after his divestiture.² If the lands are sold by the creditors of the vassal or sub-vassal, the superior has the right to demand payment of the arrears of feu-duty out of the price preferably to the claims of any of the creditors, real or personal. He may lead an adjudication of the lands, and thus obtain a title capable of becoming one of ownership; and it must be remembered that all these remedies are equally available though the whole of the original feu be sub-divided into separate feus, each being liable in its own sub-feu-duty.³

But the most effective compulsitor available to the superior is the irritancy *ob non solutum canonem* whereby, when the feu-duty runs two years in arrear, he can take steps to annul the feu-right altogether, and remove the vassal from the lands. The Act, 1597, cap. 250, already noticed,⁴ provided that feus should be annulled if the feu-duty ran into arrear for two years, in the same way as if clauses irritant were inserted in the charter. This powerful remedy is thus open to the superior whether the charter expressly provides for it or not: the irritancy may be either legal or conventional. When the con-

¹ See Lord Watson's judgment in *Sandeman v Scottish Property Investment Co.*, June 29, 1885, 12 R. H.L. 70; also, dictum of Lord President Inglis in *Sandeman v Scottish Property Investment Co.* (*supra*).

² *Scottish Heritages Co. v North British Property Investment Co.*, Jan. 23, 1885, 12 R. 550. Lord Shand dissented.

³ See Lord Watson's judgment in *Sandeman v Scottish Property Investment Co.* (*supra*).

⁴ *Supra*, p. 56.

ventional is in substantially the same terms as the legal irritancy they are indistinguishable in their effects on the right of the defaulting vassal. The legal irritancy may, however, be ousted from the feu-right by a conventional irritancy either more or less favourable to the superior than that provided by the statute; or the statutory irritancy may be renounced by the superior without any provision for a conventional one; and if these special stipulations enter the record they will bind singular successors in the superiority.¹ The superior enforces the irritancy by an action of declarator in the Court of Session (or in the Sheriff Court if the subjects do not exceed £50 of annual, or £1,000 of capital, value),² which concludes for declarator that the irritancy has been incurred, and for warrant to remove the vassal.³ The decree is made final by being recorded in the Register of Sasines.⁴ On the decree becoming final the lands revert to the superior, and the vassal loses all right to them, and is not entitled to demand compensation, however much the subjects may exceed in value the arrears of the feu-duty.⁵ The vassal, however, has an opportunity before the decree is final of preventing this result by paying the arrears, or "purging the irritancy" as it is called, and this privilege is available whether the irritancy is legal or conventional. When the superior has thus annulled the feu-right he cannot claim the arrears from the vassal.⁶ A vassal cannot avoid the irritancy by pleading a right to retain the feu-duties on account of a dispute between him and the superior as to the erection of buildings in terms of the charter.⁷

Supposing the vassal who has granted sub-feus allows his own feu-duty to fall into arrear, the superior is entitled to irritate so as to extinguish not merely the interest of the defaulting

¹ *Macvicar v Cochrane*, Feb. 10, 1749, M. 4180; *Barholm v Dalrymple*, Nov. 27, 1750, M. 7187; Lord Watson's dictum in *Sandeman v Scottish Property Investment Co.* (*supra*).

² 40 & 41 Vict. c. 50, sec. 8.

³ 3 Jurid. Styles (3rd ed.), pp. 62-3; Lees' Sh. Ct. Styles, p. 163.

⁴ Conveyancing Amendment Act, 1887 (50 & 51 Vict. c. 69), sec. 4. Prior to the passing of this statute the decree became final on being extracted.

⁵ *Cassels v Lamb*, March 6, 1885, 12 R. 722.

⁶ *Macvicar v Cochrane* (*supra*); *Magistrates of Edinburgh v Horsburgh*, May 16, 1834, 12 S. 593; *Caledonian Railway Co. v Watt*, July 9, 1875, 2 R. 917.

⁷ *Thom v Chalmers*, June 25, 1886, 13 R. 1026.

vassal, but also the rights of the sub-vassals who may have regularly paid the sub-feu-duty and performed all the prestations in their own charters. Any sub-feuar, however, has the right to pay the arrears of the principal feu-duty, and he can thus not only protect his right, but operate relief against all the other parties concerned in the feu. He is entitled to sue any of the other sub-vassals for rateable proportions, and also the mid-superior for the whole, of the arrears so paid by him. He is also entitled to obtain from the over-superior an assignation of the debt—that is, of the personal debt; but it is doubtful if he can demand an assignation of the superior's remedies, or can use these remedies without assignation. It has been decided¹ that a heritable creditor purging the irritancy is entitled to an assignation of the personal debt from the superior, but not of the superior's right of proceeding against the lands; and the same principle was applied where the original vassal had disposed a part of the lands, and put forward a third party to tender the feu-duty and claim an assignation from the superior of his remedies against the disponees.² There has been no decision exactly determining whether a sub-vassal is entitled to an assignation of anything more than the personal debt on purging the irritancy by paying up the arrears.³

A great judicial controversy occurred a few years ago in connection with this subject, and the effect of the irritancy on subaltern rights was conclusively settled as above stated. The point raised was whether, in the event of a vassal, to whom sub-

¹ *Hinshelwood's Trustees v. Watson*, reported at 8 R. 108. Lord Rutherford Clark's judgment in the Outer House was acquiesced in.

² *Guthrie & M'Connachy v. Smith*, Nov. 19, 1880, 8 R. 107. Lord Shand dissented.

³ Three of the judges in *Cassels v. Lamb* (*supra*) gave expression to dicta apparently affirming such a right. Lord Rutherford Clark said—"The defenders 'may purge the irritancy by paying the feu-duty which is in arrear, and they 'will have all the rights competent to the superior for recovering it from those by 'whom it is legally due.'" Lord Kinnear—"The true conclusion, in my opinion, 'is that the sub-vassal's remedy is to purge the irritancy and to sue the mid-superior for relief upon an assignation, if necessary, of the superior's claims.'" "It appears to me," said Lord Shand, "for the reasons stated by me in the case 'of *Guthrie & M'Connachy v. Smith*, that the defender on paying the whole feu-duty should be entitled to an assignation of the superior's rights of recovery 'against the owners of the remainder of the property not belonging to them, 'qualified as was proposed in that case."

infeudation was permissible, granting sub-feus for a just avail, the irritancy extinguishes not only the interest of the defaulting vassal but also the rights of the sub-vassals who have regularly paid the sub-feu-duty and performed all the prestations in their own charters; or whether, in these circumstances, the feu of the prime vassal reverts to the superior burdened with such subaltern rights. This question arose in two cases within the last six years, and was decided against the interest of the sub-feuar by a majority of the whole Court, and by a unanimous judgment of the House of Lords.¹ It occasioned much interesting and learned speculation regarding early feudal usages and the origin of the feu-farm holding; and the leading judgments on both sides of what was a pretty sharp conflict of juridical opinion, are most instructive on the whole question of the relationship of superior and vassal. The view which affirmed the subsistence of the subaltern right followed the analogy of forfeiture for treason, and proceeded mainly on the ground that the course of legislation, commencing in 1457 and ending at the Revolution, had conclusively determined that such forfeiture did not prejudice the rights of sub-vassals holding in feu-farm for a just and competent avail. It is exhibited in a marvellously lucid and graceful form in the judgments of the Lord Justice-Clerk (Moncreiff) in *Sandeman v. Scottish Property Investment Co.*, and of Lord Fraser in *Cassels v. Lamb*. The opposite view, and the one which ultimately prevailed, proceeded on the broad grounds that forfeiture for treason afforded no proper analogy, inasmuch as, by the common law of the Scottish feudal system, holders of subaltern rights followed the fortunes of the mid-superior; that

¹ *Sandeman v. Scottish Property Investment Co.* (*supra*); *Cassels v. Lamb* (*supra*). In both cases the irritancy was conventional; but the judgments were made expressly applicable to the statutory irritancy as well. In the earlier case, which was decided in the Second Division, the Lord Justice-Clerk (Moncreiff), and Lords Young, Craighill, and Lee held that the irritancy only extinguished the prime feu to the effect of restoring it to the superior burdened with the sub-feu granted for a competent avail. Lord Rutherford Clark dissented from the judgment of the majority, and his view was upheld by an unanimous decision of the House of Lords. Between the judgment in the Second Division and its reversal in the House of Lords the later case was decided by the whole Court in favour of the view which was ultimately upheld. The majority consisted of the Lord President (Inglist) and Lords Mure, Shand, Rutherford Clark, Adam, M'Laren, and Kinnear; and the minority, of the Lord Justice-Clerk (Moncreiff), and Lords Deas, Young, Craighill, Lee, and Fraser.

this principle of the common law had been modified by the special legislation of the fifteenth and seventeenth centuries by giving to sub-vassals holding in feu-farm for a competent avail the shield of a statutory confirmation, they not being able to purge the forfeiture incurred by the treason of their immediate superiors; that no such legislation had protected sub-vassals from the irritancy *ob non solutum canonem* and that none was needed, seeing they could protect themselves by purging the irritancy and operating their relief against the defaulting vassal; that the irritancy was primarily one of the remedies reserved to the superior for enforcing payment of his feu-duty; and that the other remedies, such as poinding of the ground, adjudication, and the like, could be operated by the superior without in any way recognising the sub-vassal's interest. This view is elaborated in the judgments of Lord Rutherford Clark in the earlier case, of the same learned judge and of Lord Kinnear in the later case, and of Lord Watson in the House of Lords.¹

In the ordinary case interest does not run on feu-duties unless there be an express stipulation to that effect. It begins to run when there has been a judicial demand, but it is not yet definitely settled whether an extra-judicial demand founds a claim for interest.²

¹ The general subject of the irritancy is discussed at greater length by the writer in the *Scottish Law Review* for January, 1889 (vol. v., p. 1).

² See *Marquis of Tweeddale's Trustees v. Earl of Haddington* (*supra*).

LECTURE V.

SUPERIOR AND VASSAL.

(CONTINUED.)

CONTENTS.—Casualties of superiority, (a) Relief, (b) Composition—Sketch of the law prior to Conveyancing Act of 1874—Method of evading composition by entry of last vassal's heir—"Implied entry" under Act of 1874, and corresponding express modifications of the law of casualties—Effect of implied entry on device for evading composition—Exposition of judgments in *Ferrier's Trustees v. Bayley*, and subsequent cases—Conveyancing Amendment Act of 1887—Its effect on casualties—Important pending questions.

THE modern law respecting the incidents or casualties payable by the vassal to his superior is so extensive, and has within recent years undergone so many important modifications, that only an outline of the subject can here be given. We have nothing to do with the old casualties of feudal superiority, except in so far as they tend to throw light on the nature of those modern payments which are part of the contract of feu-farm. These payments are of two kinds (1) relief duty, payable by an heir on his entering to his ancestor's feu, and (2) composition, the fine or consideration payable by a singular successor on his being admitted by the superior. The casualty of relief has come down from the feudal system, and composition was borrowed from the Roman contract of *emphyteusis*. The Roman tenure had no payment similar to our relief duty, nor had the feudal system any casualty equivalent to our composition. Indeed, it has only been in comparatively modern times that this latter payment was classed as a casualty at all, though now there is statutory warrant for the name, as it is so called in the Conveyancing Act of 1874.¹

¹ 37 and 38 Vict. c. 94. Section 3 enacts that the expression "casualties" includes relief-duty and composition.

This statute has effected nothing short of a revolution of the whole law of casualties. The changes it has wrought on old doctrines, though they have already been the subject of several juridical conflicts, are not yet precisely ascertained, and at the present moment two cases involving important points await the judgment of the whole Court. It is necessary, for a proper understanding of the subject, to glance at some features of the law as it stood prior to the passing of the Act just mentioned.

Relief duty was payable by an heir on his admission into the family of vassals, whether there was any stipulation to that effect in the charter or not. It consisted of a duplicand or double of the feu-duty, unless where by special stipulation a different sum was fixed. Composition was a year's rent of the lands under certain deductions, unless a fixed or ascertainable sum was specially stipulated for in the charter. Like relief, it was due *ex lege*, and did not require an express provision.

When a definite or ascertainable amount is stipulated for in the original charter in full of the superior's claim, it is called a *taxed casualty*,¹ and of course it is permissible to the superior to renounce in the charter his right to demand casualties in all time coming. Questions sometimes arise as to whether the casualties exigible by law have been effectually excluded by the contract, but the tendency now-a-days is for the Courts to construe such stipulations in favour of the vassal. A few years ago it was decided that a stipulation in a feu-contract entered into before the passing of the Conveyancing Act of 1874 for payment of a duplication of the feu-duty every twenty-five years in addition to the yearly feu-duty was to be regarded as an abandonment and discharge of all casualties, although there were no express words to that effect in the contract.² The ground of judgment was that, from the terms of the contract, it was clear that such had been the intention of the parties, so that apparently it would come to be a question of intention in each case. It may here be mentioned that such a question could not arise in the case of a charter granted after the passing of the Convey-

¹ The following cases may be consulted on the subject of the taxation of casualties—*Magistrates of Inverkeithing v. Ross*, Oct. 30, 1874, 2 R. 48; *Duke of Montrose v. Provan's Trustees*, Jan. 25, 1887, 14 R. 378.

² *Magistrates of Dundee v. Duncan*, Nov. 20, 1883, 11 R. 145. Lord Rutherford Clark dissented.

ancing Act of 1874, as it was thereby provided that new charters cannot competently stipulate for casualties other than those of definite amount payable at fixed intervals, and that no casualties are to be exigible except where expressly covenanted for.¹ In addition to casualties payable on the death of the vassal, it was competent prior to 1874 to bargain for casualties payable on each sale or transfer of the estate as well as on the death of the vassal.

Prior to the Conveyancing Act of 1874 an heir succeeding his ancestor in the feu, or a singular successor, did not become fully vested in the feu, and did not come into full legal relationship with the superior, until he went through the process of law known as *entry*—a formality which involved a renewal of the investiture by means of a fresh charter granted by the superior to the new vassal. The casualty—whether relief or composition—was payable when this “entry” took place. The superior had no right of direct action against the proprietor of the feu for either casualty. If the latter had not “entered,” the superior’s remedy was to raise against him a declarator of non-entry by which he could seize the lands and hold them until the “entry” took place, and then the casualty became payable as part and parcel of the formality. A vassal who had duly entered might divest himself of the feu by conveying it away to another, and so long as the disponent lived the superior could not demand any casualty from the new-comer, because he could not force an entry so long as he had a vassal in life, such vassal, be it remembered, remaining personally liable for the feu-duty. At the same time, the purchaser of the feu was entitled to demand an entry from the superior on tendering the appropriate casualty; but he had no great inducement thus to anticipate his responsibilities, since, by the system of conveyancing which had sprung up, he acquired by infestment a real right to the lands without entry. The moment the vassal who had disposed the lands died, the superior might come forward with his demand, armed as he was by such a powerful compulsitor. A device was then resorted to in the interests of the vassal which has had a very important influence on our law. In answer to the superior’s demand to enter and pay the composition, consisting, it might be, of a year’s

¹ Sec. 23.

rent of valuable lands, the vassal, or rather the proprietor—because, strictly speaking, he was not vassal until he had actually entered—was entitled to obtain the benefit of an entry in the person of the heir of the last vassal, supposing, of course, the heir consented to this arrangement. The advantage to the proprietor of this device of tendering the heir as the new vassal was that only relief duty was exigible, which in general was a comparatively small sum; the higher payment of composition was thus avoided, and there would be no practical difference in the proprietor's title.

The object of the Conveyancing Act of 1874 was to amend the law relating to land rights and conveyancing, and to facilitate the transfer of land. As has been said, it effected a total revolution in the law of casualties. It abolished the previous formality of "entry." The writs and charters which, under the old law, were granted and delivered as part of this formality were to be no longer necessary; and it was declared to be incompetent for the superior to grant them.¹ The legal effect which, under the old law, was given to the entry of the vassal was declared to be implied in the infeftment of the proprietor, and this was called "implied entry;" so that every proprietor, the moment he became infeft, became also by virtue of this implication an entered vassal.² At this point a difficulty at once arose and had to be met. If infeftment implied instant entry, then what about the casualty due to the superior on the occasion of the entry? Seeing that the vassal could take infeftment, and consequently enter independently of any act of the superior, was the casualty to be swept away altogether? This, of course, would have been confiscating the superior's property. Was it then to be made instantly payable, seeing that under the old law it was exigible on entry? This, on the other hand, would have been unjust to the vassal as it might have rendered him liable in a casualty while his predecessor lived, instead of postponing the payment till his death as under the previous law. Moreover, how was the superior to recover his casualty, seeing, under the old law, he had no right of

¹ Section 4 sub-section (1). Charters of novodamus, precepts or writs from Chancery, or of *clare constat*, or writs of acknowledgment were excepted.

² Section 4 sub-section (2).

direct action for payment, and under the new, entry was obtained by the vassal independent of him, and in such a way that he could not withhold it till his casualty was settled? These difficulties were all met by special provisions in the statute. It was declared¹ that a superior was, notwithstanding the implied entry, to have no right to a casualty sooner than he would under the previous law, and there was conferred on him the right of direct action, which took the form of an action of declarator and for payment.² This action he could raise against the proprietor as soon as the last vassal died and the casualty became exigible.

One difficulty, however, was not foreseen, and no provision was made for it. There has consequently ensued a chapter of litigation, which, though opened in 1877, has not yet closed. The framers of the Act evidently overlooked the rule which was noticed a little ago, whereby a proprietor, in answer to a demand for composition on the death of the last entered vassal, was entitled to put forward the latter's heir and pay the smaller casualty of relief duty; or, at least, if this rule was not overlooked, it was not apparently foreseen how it would be affected by the new provisions as to the implied entry of proprietors by the act of infeftment. The statute had barely been three years in operation when there arose a very important point, which has turned out to be the forerunner of a somewhat extraordinary series of difficult and complicated questions, disclosing great divergence of opinion on the bench. Like all the great judicial controversies on the law respecting superior and vassal, the rival camps might be divided into feudalists and non-feudalists, the former class adhering more strictly than the latter to feudal principle. As will be seen afterwards, this chapter of litigation does not appear to be approaching its close; and unless the Legislature intervenes by some definite settlement of the law, the subject of the casualties of superiority is destined to furnish materials for law-suits for many a year. The question which arose in 1877 was whether a proprietor who had taken infeftment, and was thus impliedly entered with the superior, could, in answer to the demand by the latter for the casualty of composition, put forward the heir of the last vassal and be

¹ Section 4 sub-section (3).

² Section 4 sub-section (4).

discharged of the claim on payment of relief duty.¹ In examining this question, we must bear in mind the reason why it was that a proprietor could, under the old law, evade a composition by tendering the last vassal's heir. The proprietor who could so evade the composition when the demand was made against him was not the vassal at all. Probably, in nine instances out of ten, when lands were sold, the purchaser got a disposition with two different manners of holding, or, more strictly, with an alternative manner of holding which might either be expressed in the disposition or implied by statute.² This alternative holding enabled the disponent either to hold of the disponent as his superior or of the disponent's superior. This double holding was expressed by the phrase *a me de superiore meo vel de me*, or more shortly, *a me vel de me*. If the purchaser having such a holding wished to complete his relationship with the over-superior he had to pay his casualty, and this had the effect of sweeping the disponent out of the feudal circle altogether, and then at the death of the latter no claim emerged. On the other hand, if he wished to hold under the disponent, then his infeftment gave him a real right to the lands without coming in contact with the over-superior at all. The latter's vassal continued to be the disponent, and then on his death the superior became entitled to demand another casualty. The disponent's heir succeeded him in the feudal relationship, and was entitled, if he chose, to complete his vassalage by paying relief duty. He thus occupied an intermediate position between the superior and the proprietor of the lands, and the estate which passed from his ancestor to him was what was called a *mid-superiority*. The interjection of this middleman had been originally devised for the very purpose of getting rid of the superior's claims. If the proprietor of the lands wanted to oust the mid-superior from the feudal family altogether, he could do so by entering with the over-superior, and, as will be remembered, it was always open for him to do so by paying the composition. If, however, he wished to avoid this payment—and, as has been said, there was, in the vast majority of cases, no practical advantage to be gained by making the payment—all he had to do was to arrange with the

¹ *Ferrier's Trustees v. Bayley*, May 26, 1877, 4 R. 738.

² Titles to Land Consolidation Act, 1868, section 6.

heir of the last vassal to allow himself to be tendered to the superior as the new vassal, and to pay the relief duty. The importance of the question raised after the passing of the Act of 1874 is thus seen. Was this arrangement possible in the case of a proprietor with a double manner of holding, whose infeftment had under the statute operated as an entry, seeing that the effect of this entry was to complete the purchaser's vassalage and extinguish altogether the mid-superiority remaining in the disposer? The point was very elaborately argued, and it was decided by a majority of the Second Division¹ that the statute by its fiction of implied entry had absolutely prevented the possibility of any such arrangement being effected, and the superior was accordingly held entitled to composition. It so happened that in this case the proprietor infeft on an alternative holding was himself the heir of the last vassal holding the mid-superiority.

A few months afterwards precisely the same question arose, though the accidental element of the proprietor being the last vassal's heir was wanting.² The same view was taken by the First Division³ as had been taken by the Second in the previous case; and it was further held that the implied entry being declared by the statute to have a retrospective effect, the purchaser was in no better a position by having taken infeftment prior to the commencement of the Act. The right which he previously had of putting forward the heir ceased absolutely the moment the Act came into operation. In this respect undoubtedly the rule was peculiarly harsh in its application. The moment the Act came in force every proprietor who was then infeft was impliedly entered as on the date of the registration of his infeftment, and if there was no vassal then in life who had paid a casualty, or on the death of such vassal, such proprietor, if he was a singular successor, at once became liable in a composition. It will be observed that he had no option in the matter. At the time he took infeftment no such result flowed from so ordinary and necessary an act; and he could not be expected to contemplate that subsequent legislation would interfere with his rights and liabilities to such an extent and

¹ Lord Gifford dissented.

² *Rossmore's Trustees v. Brownlie*, Nov. 23, 1877, 5 R. 201.

Lord Deas dissented.

without any overt act on his part. There was, of course, a period between the passing of the Act and the date of its coming into operation—a period of a few months—during which every infest proprietor could have taken steps to get the heir of the last vassal entered and the casualty of relief paid, and thus the liability for a composition would have been postponed till the heir's death. It may thus be said there was a short space given to proprietors to set their houses in order; but the effect of the new enactment being so entirely unforeseen, it may well be presumed that no advantage was taken of this period of grace.

The next development of this unlooked-for doctrine had relation to the liability of testamentary trustees for composition,¹ and it was held by the Second Division² and by the House of Lords, that where trustees are infest and thus entered by the statutory implication, they are liable in composition and have no option of tendering the heir,—at all events, where they represent other interests besides those of the heir, and are invested with a discretionary power of sale. The three cases referred to represented three phases of this important and far-reaching principle, and as has been seen, the judgment was not arrived at without powerful and influential dissent. Lords Gifford, Deas, and Young successively dissented from the opinions of the majority; and an idea of the subtleties with which the question was surrounded may be gathered from the views expressed by those eminent judges, and supported by them with the aid of many luminous arguments and illustrations. These may be summarised as follows:—The Legislature, in devising a fictitious entry of vassals to be implied by the fact of infestment, meant to do no more than render unnecessary a legal instrument which served no good purpose whatever. The principle on which previous reforms in feudal conveyancing had proceeded was that, by force of statute, the act, ceremony, or instrument judged to be no longer of necessity was held as performed or executed by something else which was still considered to be necessary; and so the ceremony of entering the vassal, and the superior's writ certiorating the fact, were to be regarded, by virtue of the statute, as accompanying infestment. But the statute, it was held, did no more than this.

¹ *Lamont v. Rankine's Trustees*, Feb. 28, 1879, 6 R. 739, aff. Feb. 27, 1880, 7 R. H.L. 10.

² Lord Young dissented.

It gave the superior no right which he did not possess previously, and took away from the vassal no privilege which he had before enjoyed. Accordingly, the superior was not to be entitled to plead the implied entry as giving him right to a composition in circumstances which, before the Act passed, would only have brought him relief duty; and conversely, the vassal was not, in consequence of this constructive entry, to lose his immunity from composition if the heir of the last vassal was ready to step into his ancestor's position in the feudal economy. The argument that, by the very nature of the case, there was no such position for the heir to fill, because the implied entry of the disponent had utterly extinguished it, was met in this way, that while the implied entry served the only purpose for which it had been devised by obviating the necessity for the actual instrument and fact of entering, the moment the substantial and pecuniary rights of the parties came to be considered, the statutory entry was to be regarded as fictitious, and as in no way altering these rights,—that *quoad* the determination of casualties, their exigibility, their nature, or the time of their payment, the implied or fictitious entry was to be deemed no entry at all. The weak point in this argument is that nowhere does the statute say expressly that the implied entry is to remain in abeyance in determining the rights of superior and vassal in the matter of casualties, except in regard to the time of payment. The superior, it is declared,¹ is not to be entitled to a casualty in consequence of the implied entry *sooner* than he would have been by the previous law, or by the conditions of the feu-right—that is to say, notwithstanding the statutory entry of the new vassal, the superior is to wait till the death of the vassal who has last paid a casualty before he can demand another from his successor. This was in effect the ground upon which the House of Lords adopted the view of the majority on the general question²; and it was pointed out by Lord Blackburn that this *ratio decidendi* was not inconsistent with the enactment in the statute that the implied entry was not to “prejudice or affect” the superior's rights to his casualties,³—a provision which Lord Gifford⁴ held adverse to the enlargement in any way, or under any circumstances, of the superior's rights.

¹ Section 4 sub-section (3).

² *Lamont v. Rankine's Trustees (supra.)*

³ Section 4 sub-section (3).

⁴ *Ferrier's Trustees v. Bayley (supra.)*

It must be kept in view that it is only where the singular successor takes infeftment that the results arrived at in these three cases are possible, because it is only after infeftment has passed that there is any implied entry, and until entry has been implied by virtue of the statute, the mid-superiority in the person of the heir subsists, and can be made available with the view of evading the composition. So long as the singular successor remains uninfeft the heir of the last vassal can be tendered to the superior along with relief duty in answer to his demand, just as if the changes operated by the statute had not taken place.¹ Extreme care, however, requires to be exercised in resorting to this device, as it introduces in not a few cases awkward complications in titles.²

It will be noticed that, as far as our examination has proceeded, the result arrived at by the Court had been to enlarge the superior's rights in giving him a composition in circumstances which, prior to the Act of 1874, would have only brought him a casualty of relief. In 1886 a contrary tendency set in, and has been operating ever since, so that it cannot fail to be observed that the principle affirmed in the earlier cases is being to some extent modified, though none of these cases have been overruled. In 1886 the First Division held that, where the heir took infeftment on a singular title derived from his ancestor, he was not thereby liable in composition, but only in relief.³ It was laid down that the form of the title is immaterial in determining the casualty due on the entry of an heir; that regard must be had to the character of the successor rather than to that of the title; and that his actual character as heir determines his casualty as that of relief. The implied entry introduced by the Act of 1874 is declared⁴ to have the same effect as if the superior "had granted a writ of confirmation according to the existing law and practice"; and under the old law it was well settled⁵ that

¹ *Duke of Hamilton v. Guild*, July 6, 1883, 10 R. 1117; *Hope v. Duke of Hamilton*, July 6, 1883, 10 R. 1122.

² See *Sivewright v. Straiton Estate Co.*, June 12, 1878, 5 R. 922.

³ *Mackintosh v. Mackintosh*, March 5, 1886, 13 R. 692.

⁴ Section 4 sub-section (2).

⁵ See *M'Kenzie v. M'Kenzie*, 1777, M. App., Sup. and Vas., No. 2; *Brown v. Magistrates of Musselburgh*, 1804, M. 15038; *Marquis of Hastings v. Oswald*, May 27, 1859, 21 D. 871; and Lord President Inglis' comments on these authorities in *Mackintosh v. Mackintosh* (*supra.*)

an heir who held by singular title could demand from the superior in return for relief duty a charter of resignation on which he could take infeftment, or he could take infeftment on the precept in his title and demand from the superior a charter or writ of confirmation. The heir who was infeft on a singular title was under no necessity of creating in his own person a duality of title by presenting himself to the superior in his character as heir and obtaining a precept of *clare constat*. In *Mackintosh v. Mackintosh* these principles were recognised to be as applicable to an heir entered by virtue of the statutory implication as if he had been entered or had been claiming an entry by confirmation under the old law. In either case his character as heir was the determining element in fixing the nature of his casualty.¹

It has been held by Lord Kinnear in the Outer House² that trustees infeft on an *inter vivos* trust disposition for behoof of creditors, and containing a power of sale and an obligation to reconvey to the trustee after the debts were satisfied, are not liable in a casualty to the superior. The truster was himself the heir of the last vassal, and was liable in relief duty, but the superior made no demand until after the trustees had taken infeftment on their conveyance, and then he claimed a composition. The ground upon which they were relieved was that infeftment under a conveyance which bears on its face to be a conveyance in trust for payment of creditors, even though it gives power of sale to the trustees, does not divest the granter of his feudal title, but merely operates as an encumbrance upon his right.³ It must be kept in view, however, that it is only when the conveyance expressly bears to be for payment of debt that this principle applies. If the disposition were *ex facie* absolute, qualified by a back bond, the superior would be entitled to disregard the arrangement, and claim composition from the trustees,

¹ The subject of the Conveyancing Act of 1874 in its relation to casualties, so far as the law had been developed at the time of the decision in *Mackintosh v. Mackintosh*, was discussed by the writer in two articles which appeared in the *Scottish Law Review* for March and April, 1887, vol. iii., pp. 69, 89.

² *Marquis of Huntly v. Earl of Fife*, 14 R. 1091. The decision was given on 5th December, 1885, though it is reported under date July 20, 1887.

³ *Campbell v. Edderline's Creditors*, Jan. 14, 1801, M. App. Adjdn. No. 11; *Gilmour v. Gilmour*, July 3, 1873, 11 Macph. 856; and other cases cited by Lord Kinnear in *Lord Home v. Lyell* (*infra*).

because "the investiture of a donee upon an absolute title " would have left no room for the supposition of a continuing fee " in the donor."¹ The same Lord Ordinary, in a subsequent case,² relieved from liability in a composition a trustee holding for creditors under a *mortis causa* disposition which directed him, after payment of debts, to convey to certain testamentary trustees under another deed, and the judgment was affirmed by the First Division. In such conveyances for payment of debts the infestment of the trustees is a mere encumbrance on the title until the power of sale has been exercised and a donee's infestment has operated a divestiture of the trustor. Then, but not till then, is there any change of the investiture so as to give rise to the superior's right to a composition. In the last cited case³ a like doctrine was affirmed where the trust was for a special and temporary purpose of such a nature as not to divest the grantor of his radical right, which, after his death, passed into his *hereditas jacens*, and could be taken up by his heir, notwithstanding the infestment of the trustees.

In another case decided in the same year⁴ there occurred a development of the doctrine laid down in *Mackintosh v Mackintosh*, which, as was seen, relieved from composition the heir infest on a singular title derived from his ancestor, the last vassal. Instead of holding by direct disposition from the last vassal, the heir in *The Duke of Athole v. Stewart*, acquired the estate by conveyance from the last vassal's testamentary trustees in implement of a direction to that effect, and was infest thereon at the passing of the Act of 1874. The principle of *Mackintosh v Mackintosh* was applied, and the superior held entitled to relief duty only, on the ground that, as the trustees had conveyed to the heir in execution of the trust, the latter was in the same position, so far as the superior's claims were concerned, as if the ancestor had conveyed to him directly; and it was indicated that the same result would have been reached supposing the trustees had themselves been infest when the Act of 1874 came into opera-

¹ Lord Kinnear in *Marquis of Huntly v. Earl of Fife* (*supra*.)

² *Lord Home v. Lyell*, Dec. 20, 1887, 15 R. 193.

³ *Lord Home v. Lyell* (*supra*.)

⁴ *Duke of Athole v. Stewart*, Dec. 20, 1887. This case was decided by the Lord Ordinary (Kinnear), and a reclaiming note was presented to the First Division on Jan. 10, 1888, but there does not seem to have been any judgment.

tion, and had in consequence become impliedly entered with the superior.¹

During 1887 the attention of the Legislature was very specially directed to the state of the law of casualties as disclosed by these decisions, and to the difficulties which had arisen from a statute passed for the very purpose of simplifying the titles to land, and smoothing the relationship between superior and vassal. The result of the agitation was that an Act was passed in that session making an effort towards the amendment of the law.² By this statute³ it is provided that where, by a *mortis causa* settlement, lands are conveyed to trustees for behoof of the heir of the testator, or with directions to convey the same to the heir whether forthwith or after the expiration of any period of time not exceeding twenty-five years, or by virtue of which the heir has the ultimate beneficial interest in the lands, the trustees shall not, upon their entering, or by reason of their having entered prior to the Act, be liable for any other or different casualty than would have been payable by the heir himself if he had taken the lands by succession without a conveyance to trustees. No other clause in this statute deals with the subject of casualties, and it will be observed that it touches only one—and by no means the most important—phase of the doctrines established by the decisions.⁴ It relieves from com-

¹ Reference may be made to the case of *The Governors of Heriot's Hospital v. Carnegys*, Oct. 31, 1884, 12 R. 30, where a nice question was raised as to whether composition or relief was exigible, but where, owing to the form in which it was stated, the decision is not of much value as elucidating the law.

² The Conveyancing (Scotland) Acts (1874 and 1879) Amendment Act, 1887 (50 and 51 Vic. c. 69).

³ Section 1.

⁴ When the Bill passed the House of Commons it contained a clause giving an infert disponent right to put forward the heir of the last vassal in answer to the demand for a casualty; but at the instigation of the Duke of Argyll, this clause was thrown out by the House of Lords, and the Bill became law without it. In eliminating this part of the measure, his Grace propounded a theory that the right of the proprietor to discharge his obligations by paying the smaller casualty in name of the heir was taken from him when the Act of 1874 passed in consideration of the right which he got by that Act to redeem his casualty on moderate terms. In disposing of this theory it need only be said that no such compromise was within the contemplation of the Legislature; and it was only when the case of *Ferrier's Trustees v. Bayley* raised the question that the effect of the implied entry introduced by the statute was recognised.

position trustees who are infeft for behoof of the heir of the investiture alone; but it is by no means clear that such trustees would prior to the Act have been held liable in composition. In deciding *Lamont v Rankine's Trustees*, Lord Curriehill reserved his opinion "as to the liability of trustees for "more than relief duty where they hold the estate without "power of sale, and solely for behoof of the heir of the "investiture¹"; and down to the passing of the recent Act no decision had been given making trustees in such circumstances liable for a composition. The judgment in *Mackintosh v. Mackintosh*, in which an heir infeft on a singular title was held liable only in relief duty,² was rather adverse to the liability of trustees holding only for the heir, especially when considered along with Lord Kinneir's decision in *The Duke of Athole v. Stewart*, which relieved the heir who had acquired the lands, not by direct disposition from his ancestor as in *Mackintosh v. Mackintosh*, but through the medium of trustees who had taken infeftment and became impliedly entered. The case of *The Duke*

¹ 6 R. 742.

² The principle laid down in *Mackintosh v Mackintosh* was that the character of the successor, and not the form of his title, is the true test of the casualty, and in this view, the fact of the heir holding through the medium of trustees, ought to be disregarded in determining whether composition or relief duty is to be paid for the entry. There is little difference in principle between the case of trustees holding exclusively for the heir, and that of the heir holding for himself by singular title. The substantial and beneficial ownership is the same in both cases. When the heir takes infeftment as a disponee, and obtains an entry in the guise of a singular successor, the superior, in accepting relief duty, as he is bound to do, recognises the title as being only in form a singular one, and the heir himself as assuming only the attitude of a singular successor. The vassal's true character as heir, with his substantial title of heirship, remains in abeyance, though in reality determining what casualty is exigible. In like manner, why should not the title of trustees, who hold for the heir alone, be discarded as a casualty test? The ancestor, instead of conveying the estate to the heir in his own person, conveys it to trustees for his behoof. But this difference in the form of the singular title does not alter the heir's character. His relationship to his ancestor is not affected either by the latter having chosen to transmit the lands by deed instead of allowing them to pass by succession on the one hand, or on the other by the precise method of transmission adopted, always assuming that no interest adverse to that of the heir is introduced. If it is permissible to look behind the singular title, and take cognisance of the real relationship subsisting between the heir and his ancestor (though that relationship does not enter as an element into the actual title), why should it not be equally competent to go through a like process where the heir does not hold the singular title in his own person, but through others who represent no interest but his?

of *Athole v. Stewart* was raised before the passing of the Act of 1887, and was not decided till after it became law. During its progress the heir who was sought to be made liable in a composition added a plea based on the statute, but Lord Kinnear decided in his favour in respect of the pre-existing law; and while he found it unnecessary to determine whether the superior could have demanded composition from the trustees before they denuded (which would have been the very point dealt with by the statute), he indicated an opinion in favour of their non-liability in a higher casualty than relief. A trust created for the purpose of holding the estate for temporary uses, and then conveying it to the heir of the investiture, does not differ essentially from those special and temporary trusts which, in the cases of *Marquis of Huntly v. Earl of Fife*, and *Lord Home v. Lyell*, were held to be mere encumbrances on the fee, and to operate no change in the investiture such as to validate the superior's claim. It is thus doubtful if the statute has effected any change on the old law—a result which was foreseen and predicted before it passed. Still, abortive though it be, it has apparently put an end to the agitation for an amendment of the law of casualties; so easily is the amateur law-reformer tickled with a legislative straw!

Two cases involving highly important points as to the effect of the Act of 1874 on casualties, and constituting a further development of certain of the doctrines established by the previous decisions are at present pending in the Court. They are both Second Division cases, and in respect of the importance of the questions raised, minutes of debate have been ordered for the opinion of the judges of the whole Court. More than usually instructive judgments may therefore be expected.

Both cases are at the instance of the same superior, and in the first one to be here noticed² he sues the vassal for payment of composition in respect of several parcels of land which the latter acquired by disposition from his father's testamentary trustees. The last entered vassal died in 1865, and by a *mortis causa* deed he disposed the lands to trustees, with directions to convey them to his children on the youngest attaining majority.

² *Harington Stuart v. Jackson*, decided by Lord Kinnear, Dec. 20, 1887.

The trustees were infeft in the lands prior to 1874, and on the passing of the statute became impliedly entered. No demand was made by the superior for any casualty, and in 1883 they conveyed the lands to the present vassal, who was the truster's only child; and after he had taken infeftment on the disposition, the superior claimed a composition. One of the questions raised is the same as that decided by Lord Kinnear, in *The Duke of Athole v. Stewart*, namely, as to the liability in a composition of an heir infeft on a disposition granted by the ancestor's trustees, who themselves were infeft on a *mortis causa* settlement containing directions to convey to the heir. In *Harington Stuart v. Jackson*, Lord Kinnear, in relieving the vassal from liability in a composition, has held that this was really the same question which was decided in *Mackintosh v. Mackintosh*, and that the intervention of a trust, practically for the heir's behoof, made no difference. "I do not think it necessary," he says in "the note to the Interlocutor, to determine whether the trustees "were entered by the Act of 1874, or whether they could have "been required to pay composition in consequence of their entry. "In the event which has happened, the trust was for the benefit "of the defender alone, and it was finally executed by a convey- "ance of the estate to him. There is ground, therefore, for "holding that the trust was nothing more than a burden on his "radical right; and, therefore, that the infeftment of the trustees "would not have excluded the entry of the heir in that character. "But whatever might have been their liability, if a claim for a "casualty had been enforced against them, they have now been "divested without any such claim having been made; and the "claim against the defender must therefore be determined on the "assumption that there has been no intermediate entry between "his father's death and his own infeftment. . . . It follows "that the amount exigible from the defender must be determined "by the character in which he succeeds, or is entitled to succeed, "to the late vassal. The suggestion that it should be determined "by his relation to an intermediate proprietor who paid no "casualty for his entry, and whose entry accordingly cannot be "pleaded against the superior, appears to me to be altogether "inconsistent with the statute. . . . If the defender's liability "depends upon his relation to the last vassal, I do not think it "doubtful that he is liable only for relief. By the form of the

"title he is a singular successor, but he is in fact the heir of the last investiture. He is in no worse position, by reason of his having entered upon a conveyance from his father's trustees, than if he had entered upon a *mortis causa* disposition by his father, directly in his own favour."

Another question involved in the case relates to the effect of a life-rent infestment in the whole lands. It is settled law, as old nearly as the tenure of feu-farm itself, that where the superior confirms an infestment in life-rent it postpones his claim for a casualty against the fiar during the subsistence of the life-rent, and that such postponement takes place without his consent or confirmation where the life-rent is one by operation of law.¹ Thus if lands are subject to the widow's terce, the superior's claim for a casualty against the fiar is postponed as regards one third of the lands till the death of the widow, and the same rule applies to the courtesy of the husband with regard to the whole lands. In *Harington Stuart v. Jackson* there is a legal life-rent to the extent of one third of the lands, and a conventional life-rent to the extent of the whole in the same person, whose infestment implies entry under the Act of 1874, and an attempt is being made on behalf of the fiar to postpone the superior's claim till the expiry of this life-rent, in respect that the implied entry is the same thing as the superior's confirmation under the old law; and it is argued that the provision of the statute against the pleading of the implied entry in defence to an action for a casualty does not apply where the implied entry of a liferenter is pled for the purpose not of excluding but of postponing the superior's claim.

In the other case² the superior sues for a composition in somewhat peculiar circumstances. The title to the lands had got into a state of complication owing to successive devices for evading composition by entering the heir on payment of relief. The beneficial ownership of the lands passed down through a series of persons without infestment, while the feudal ownership was transmitted from heir to heir, each of whom made up a title for the sole purpose of satisfying the superior's demand with relief duty. At length one of these heirs—the last vassal who paid a

¹ Stair, ii. 4, 23; Ersk., ii. 5, 44; Bryce, M. 9333; Duff's *Feudal Conveyancing*, p. 477; *Scott v. Elliot*, March 11, 1636, M. 15055; *Baird*, July 18, 1663, M. 15054.

² *Harington Stuart v. Hamilton*, decided by Lord Kinnear, Dec. 20, 1887.

casualty—conveyed the lands to the beneficial owner, who took infeftment in 1860, and when the Act of 1874 passed, he became entered by the statutory implication. It happened that this beneficial owner who so acquired the feudal title was the heir-at-law of the last vassal, so at this stage we have the instance of an heir holding by singular title from his ancestor, as in *Mackintosh v. Mackintosh*, but the ancestor, the last entered vassal, remained in life after the heir's infeftment and implied entry, and did not die till 1877. Though a casualty thus became exigible in that year none was demanded, and the proprietor, who was impliedly entered by the Act of 1874, died in 1886, leaving a *mortis causa* settlement in favour of his heir, who took infeftment thereon, and then a casualty of composition was demanded from him by the superior. The question to be determined by the action is whether this proprietor, who happens to be the heir-at-law not only of his immediate predecessor in the ownership of the lands, but also of the last vassal who paid a casualty, is liable in a composition or only in relief duty. Lord Kinnear has held that only relief duty is exigible. The superior attempts to elude the authority of *Mackintosh v. Mackintosh*, by an argument that an heir infeft on a singular title from his ancestor can only escape payment of the composition if at the time he took infeftment on the singular title it was possible for him to have made up a title in the alternative form of a service as heir, and that unless the heir in *Mackintosh v. Mackintosh* had been in such a position the judgment would have been different. If the ancestor who has paid the last casualty survives the date of the infeftment of the heir it is *ex hypothesi* impossible at the time of the infeftment for the heir to serve to that ancestor: the character of heir has not attached to him so long as the ancestor is in life, and by the time the service is possible there is nothing to serve to, because the estate has, during the lifetime of the ancestor, been taken out of his person by the infeftment and implied entry of the heir. This argument is met by shewing that in the two cases¹ relied on by the Court in deciding *Mackintosh v. Mackintosh* as conclusive authorities, the heir was necessarily precluded from making up any other title except that of a singular successor.

¹ *M'Kenzie v. M'Kenzie* and *Marquis of Hastings v. Oswald* (*supra.*)

It will be observed that in one cardinal feature *Harington Stuart v. Hamilton*, is identical with *Ferrier's Trustees v. Bayley*, the earliest case in this notable chapter of litigation. In both cases the person against whom the demand for a composition was made was in fact the heir-at-law of the last vassal who paid a casualty, though acquiring the lands by a series of singular titles. In the pending case the singular title was a personal one until the predecessor of the defender took infeftment on a disposition from the last vassal who paid a casualty, this infeftment merging the beneficial and feudal fees in one individual. In the earlier case there was no separation of the beneficial and feudal fees, and no conveyance from the last vassal who paid a casualty (the ancestor), to the vassal from whom one was demanded (the heir), though in fact the relationship of ancestor and heir subsisted between them. It is a well settled principle that the superior, in making good his claim for casualties, has no concern with any personal titles his vassal may hold;¹ and if Lord Kinnear's judgment in *Harington Stuart v. Hamilton* is affirmed, there will be ground for the opinion that *Ferrier's Trustees v. Bayley* has to some extent been over-ruled, and that a distinct tendency has set in adverse to the leading principle there decided.

¹ *Duke of Hamilton v. Guild*; *Hope v. Duke of Hamilton* (*supra*).

LECTURE VI.

SUPERIOR AND VASSAL.

(CONTINUED.)

CONTENTS.—Other changes effected by Act of 1874 on casualties—Redemption of casualties—Method of ascertaining amount of composition—How rental fixed—Deductions from rental—Questions between seller and purchaser as to relief from casualties—Inherent conditions of the tenure as distinguished from (a) real burdens, and (b) personal obligations of the feuar—How they are enforced—Illustrations in recent cases—Restrictions in feu-contracts—How interpreted and enforced—How superior's right of enforcement defeated (a) by acquiescence (b) by want of interest—Right of co-feuar to enforce conditions imposed by common superior.

IN connection with the effect which the Conveyancing Act of 1874 had on casualties, another point may be briefly noticed. Where different proprietors in succession have been infeft in the same lands without any casualty being demanded by the superior, the casualty paid by the proprietor in possession is held to be in respect of his own entry, and the superior is not entitled to exact any further casualty until the death of such proprietor.¹ Trustees were entered with the superior in 1855. Three successive transmissions of the estate (but without any renewal of the investiture) took place between this entry and the passing of the Conveyancing Act, the third disponee being impliedly entered by force of the statute. The last survivor of the trustees died in 1871, thus placing the superior in a position to demand a casualty. He did not do so, however, and the proprietor who held the estate when the Conveyancing Act passed sold it, the purchaser's disposition being recorded in 1875. The estate of superiority changed hands in 1879, and the new superior received a casualty of composition in 1883 from the then owner, who was infeft and entered under the statute. The receipt given by the superior bore that the money paid was in

¹ *Mounsey v. Palmer*, Déc. 6, 1884, 12 R. 236.

respect of the casualty exigible on the death of the last entered vassal in 1871, and it appears it was repaid to the proprietor by his predecessor in implement of the usual obligation of relief in the conveyance. Thereafter such predecessor, the first proprietor of the estate who had become impliedly entered by virtue of the statute, died, and the superior thereupon demanded another composition from the proprietor as being the casualty payable on the death of his predecessor, who was an entered vassal. It was held, however, that the payment previously made to the superior was the casualty due in respect of the entry of the proprietor, and that as long as he lived no further casualty could be exacted. The Court dealt with the point as being practically one of fact, holding that the casualty already paid by the vassal was in reality that which the superior was demanding a second time. The result of the judgment, however, is that, during the lifetime of the vassal who has paid a casualty, no further casualty is exigible, however many intermediate proprietors may have taken infeftment and been impliedly entered under the statute. The fallacy which underlay the superior's contention was in regarding the casualty as payable in respect of the death of an entered vassal, instead of in respect of the entry of a new vassal. As soon as infeftment of a proprietor implies entry, the superior's right to a casualty emerges, *provided* no vassal is living who has paid a casualty. If there is such a vassal in life, then no right emerges till his death, when the casualty becomes exigible from the proprietor in the present possession of the estate. The right given to the superior by the Act to sue an uninfest successor of the vassal for a casualty is not inconsistent with this principle, for such is really an equivalent of the old right to force an entry and the accompanying payment of the casualty by means of a declarator of non-entry directed against the possessor of the lands.

An important change is operated by the statute on the old rules respecting the payment of composition by corporations, trustees, or persons having separate interests. Prior to 1874, when trustees took an entry in their own name, this protected the lands from a further liability in a casualty till the death of the last survivor of the trustees, at least, where

their title was one which passed to survivors, and where there was no express stipulation that another casualty was to become due at a different period, *ex. gr.*, on the death of a particular trustee or of the beneficiary. The superior was not bound to enter a corporation unless there was a special stipulation to this effect.¹ Since a corporation never dies, the superior by entering it would have absolutely excluded his right to demand casualties for the future. The Conveyancing Act of 1874 makes provision for trustees and corporations paying composition at stated intervals.² In the absence of express stipulation, corporations and trustees, after paying the usual composition at the date at which they would have paid under the old law, repeat the payment every twenty-fifth year thereafter; and should they cease to hold the lands after so paying composition, the successor (not being a corporation or a body of trustees) infeft at the end of the twenty-five years will be liable in a further casualty, and then the liability for casualties will be the same as if the lands had never been held by a corporation or by trustees. Where the feu right stipulates for a casualty on each transmission of the lands, as well as on the death of the vassal, the period for payment of the casualty recurs every fifteen years, instead of every twenty-five years; and it is also provided that "where, by the terms of the feu rights of the lands, a taxed composition is payable on the occasion of each sale or transfer of the property, as well as on the occasion of the death of each vassal; and where an entry is implied in terms of this Act in favour of two or more parties having separate interests, as liferenter and fiar respectively, or as successive liferenters, a composition, or, in the case of parties interested *pro indiviso*, a rateable share of a composition, shall be due by and eligible from each of the parties who shall take or derive benefit under the implied entry in the order in which they shall severally take or derive benefit under such implied entry, with such interest, if any, as may be stipulated for in the feu right during the not payment of casualties."³

The other provisions of the Act relating to the subject of casualties may here be noticed. Five sections⁴ are devoted to

¹ *Hill v. Merchant Co. of Edinburgh*, Jan. 17, 1815, Fac. Coll.

² Section 5. ³ Section 5. ⁴ Sections 15, 16, 17, 18, and 19.

the redemption of casualties incident to feus created before the commencement of the Act. The superior and vassal are at liberty to agree themselves as to the terms of the redemption, but if they fail to do so, the vassal can compel the superior to redeem on the terms prescribed in the statute, in the case of casualties other than those consisting of a fixed amount stipulated and agreed to be paid in money or fungibles at fixed periods or intervals. Casualties consisting of definite amount payable at fixed intervals are not redeemable except by agreement between the parties. In the case of casualties exigible only on the death of the vassal, the redemption money is the amount of the highest casualty estimated as at the date of redemption, with 50 per cent. added; and in the case of casualties exigible on each sale or transfer of the lands, as well as on the death of the vassal, the redemption money is two and a half times the amount of the highest casualty estimated as at the date of the redemption.¹ Where the casualty is calculated at the aggregate of sums payable every year from the date of the last entry, the redemption money is fixed at eighteen times such annual sum. The redemption under the statute only applies to future casualties. Any casualty which has become exigible prior to the time of redemption must be paid in addition to the redemption money.² When the amount of the redemption money has been fixed, the superior has an option either to pay the sum in cash or to have it converted into a feu-duty at 4 per cent. on the capital sum.³ The statute also contains provisions for a formal discharge of the casualties when they have been redeemed, and for a memorandum converting the redemption money into a feu-duty when the superior elects so to do. Both documents, in order to be effectual, require to be recorded in the Register of Sasines.⁴ It has been decided that a proprietor infeft and, therefore, impliedly entered in part of an original feu, is entitled to redeem the casualties applicable to that part, and is under no obligation

¹ In the cases of *Allan's Trustees v. Duke of Hamilton*, Jan. 12, 1878, 5 R. 510; *M'Laren and Others v. Burns*, Feb. 18, 1886, 13 R. 580; and *School Board of Neilston v. Graham*, Nov. 16, 1887, 15 R. 44, the question was raised as to the mode of estimating casualties for redemption purposes; but the effect of these cases will be shown below when the method of ascertaining the amount of the composition is considered.

² Section 15. ³ Section 17. ⁴ Sections 16 and 17.

to redeem the casualties incident to the whole feu.¹ It will be observed that by virtue of this principle, which has been most authoritatively affirmed, an original feu can, without the superior's consent, be split up into parts so far as regards casualties; though, as has been seen, there can be no such partitioning of an original feu, *invito superiore*, in relation to the payment of the feu-duty. It would seem to be a corollary from the decision just cited, that the superior is not entitled to demand from the owner of part of an original feu, entered by implication of the statute, the casualty applicable to the whole feu, but only that applicable to the part; though, as will be seen below, it has been held that as regards relief-duty and taxed composition the superior can proceed against the lands as for a *debitum fundi*, which involves the right to execute real diligence against every part of the original feu. It must be kept in view that it is only a person who is in the position of the entered vassal, either by the statutory implication or by entry under the old law, who can claim the privilege of redemption. If a person holding on a title on which no infeftment has passed apply to the superior to have the casualties redeemed, the latter would be entitled to refuse to recognise him in any way.²

A matter of very considerable practical importance is the method of ascertaining the amount of the composition. Where untaxed, it consists of one year's rent³ of the lands under certain deductions. The rental taken as the basis is not merely the annual value of the feu, as originally given out by the superior, but the actual rental at the time when the casualty falls to be estimated, as the same may be enhanced by the buildings and meliorations of the vassal.⁴ Prior to 1874, there was no difficulty in fixing what year was to be taken as furnishing a particular

¹ *Edinburgh Roperie and Sailcloth Co. v. The Magistrates of Edinburgh*, July 10, 1877, 4 R. 1032; *aff. Nov.* 12, 1878, 6 R.H.L. 1.

² See dictum of Lord-President Inglis in *Edinburgh Roperie and Sailcloth Co. (supra)*; see also *Morris v. Brisbane*, Feb. 21, 1877, 4 R. 515.

³ The measure of the composition was fixed by statute in the fifteenth century, when superiors were first compelled to enter a limited class of successors. The Act 1469 c. 36, ordained superiors to enter persons apprising the vassal's lands for debt, on their paying "a year's mail, as the land is set for the time."

⁴ *Anderson v. Marshall*, November 30, 1824, 3 S. 334.

rental as a basis of the composition; as it was the year when the actual entry of the vassal took place, and when the casualty became payable. Since, however, the Act of 1874 has essentially altered the character of the casualty, and converted it into something like a proper debt, payable on the occurrence of a definite event, it has come to be a question of difficulty as to what year is to be taken as affording the required rental. The Court has affirmed the principle, that a casualty became payable on the date when the Act of 1874 came into operation by an infest proprietor of lands, then in non-entry, though no casualty was claimed till several years afterwards;¹ a principle which excludes the year of the judicial demand as being necessarily the determining one. Otherwise, there are three possible years which may be taken—(1) the year of the death of the last vassal who paid a casualty; (2) the year in which the vassal, against whom the demand is made, has obtained implied entry by infestment; and, (3) where there has been a succession of intermediate infest proprietors between the date of the death of the last vassal who paid a casualty, and the date of the judicial demand,—the year of the infestment and implied entry of the first of these intermediate proprietors. Where a casualty is demanded from a proprietor who was infest, and impliedly entered during the lifetime of the last vassal who paid a casualty, the first of the above years is taken, viz.—the year of the last vassal's death.² Where the claim is made against a proprietor who took infestment and became impliedly entered after the last vassal's death, the year to be selected is the second of the above years, i.e., the year of such proprietor's infestment and implied entry, provided such infestment and implied entry is the first which has accrued since the last vassal's death. Where, however, there has been interposed between the death of the last vassal who paid a casualty, and the implied entry of the person from whom another is demanded, the implied entry of one or more proprietors, the determining year is that of the first implied entry after the last vassal's death since it is this implied entry which fills the fee.³ These rules seem deducible from the

¹ *Straiton Estate Company v. Stephens*, December 16, 1880, 8 R. 299.

² *Stewart v. Murdoch & Rodger*, June 6, 1882, 19 S. L. R. 649. Lord Curriehill's decision in the Outer House was acquiesced in.

³ *Sivewright v. Straiton Estate Company*, July 8, 1879, 6 R. 1208.

authorities cited; though, in a more recent case,¹ Lord Fraser selected the year of the defender's implied entry, while the fee was filled up by the implied entry of a previous proprietor, against whom, though liable, no claim had been made. The selection of that year, however, as against the other, made no difference in the result, the rentals being the same. If the defender's implied entry be taken in all cases as the determining period, when it is posterior to the death of the last vassal who settled with the superior, the casualty of composition may still be of "a fluctuating and expansive character," and may, as under the old law, be liable to be increased or diminished by delaying to settle the claim—a result which Lord Curriehill held the Legislature intended to avoid.² Prior to 1874 it was often a matter of practical wisdom for a proprietor, who might happen to be in non-entry, and who contemplated increasing the value of the feu by buildings, to enter with the superior and pay his composition before commencing his operations, so as to avoid a casualty calculated on a much higher rental. If the above rules can be relied on, there will be no further necessity for this precaution.

Apart from the question as to what particular year is to be taken, difficulties not unfrequently arise in estimating the rent or annual value of the lands to be used as a basis for fixing the composition. The true criterion is the fair value of the lands regarded as "a substitute "or equivalent for a year's actual possession of the feu"; because, under the old law, the superior's remedy in case of non-payment of his casualty, was to seize and hold the lands for his own profit.³ Several points have of recent years arisen and been settled in applying this criterion. The statute,⁴ compelling superiors to receive appraisers of the feu, fixed the composition at

¹ *Campbell v. Stuarts*, December 11, 1884, 22 S.L.R. 292. Lord Fraser's judgment was acquiesced in.

² *Stewart v. Murdoch & Rodger* (*supra*) "It appears to me," said his Lordship, "that the Legislature meant to provide fixed and certain data for calculating "the amount of this casualty, and made it actually due and payable to the "superior at the date when his right of action emerged, the debt continuing to be "due by the vassal, though without interest until paid, either voluntary or under "judicial demand."

³ See dicta of Lords Ormidale and Gifford in *Allan's Trustees v. Duke of Hamilton* (*supra*).

⁴ 1469, c. 36.

a "year's mail, as the land is set for the time," and where there is an actual rental, payable under a *bona fide* contract of lease, there can be no better test of the annual value. The principal rent, and not that payable under a sub-lease is taken,¹ and the superior cannot insist on any prospective or hypothetical value. A vassal having disposed the feu by contract of ground annual for a yearly payment of £20 per acre for building purposes, the disponent, before commencing his operations, was held entitled to settle with the superior for the casualties on the basis of the agricultural rent, which was between £1 and £2 per acre.² The actual and fixed rents derived from minerals in the course of being worked to a moderate extent are included in the annual value;³ but where minerals are not let at a fixed rent, and are approaching exhaustion, the mode of calculating the casualty is to capitalize, at ten years' purchase, the average rents for three years, and take the interest at 4 per cent. on the capital sum as the yearly rent.⁴ Although the Statute 1469 c. 36, defines the measure of the superior's right as "a year's mail, as the land is set for the time," it is not necessary that the lands be actually in the occupation of a tenant with a fixed rent. Where they are in the personal occupancy of the vassal, an estimate is made of what they might be expected to yield one year with another,⁵ and it was recently held to be "a legitimate consideration that the subjects had a value to a particular person or body of persons which it had not in the open market, together with the degree of permanency of that value."⁶ In accordance with these principles, it has been held that unlet shootings, where they are of such appreciable value as to be capable of being let, are included.⁷ In the case of land held by a railway company as part of

¹ *Campbell v. Stuarts* (*supra*).

² *School Board of Neilston v. Graham* (*supra*).

³ *Allan's Trustees v. Duke of Hamilton* (*supra*); *Sturrock v. Carruthers Trustees*, May 21, 1880, 7 R. 799.

⁴ *Sivewright v. Straiton Estate Company*, July 8, 1879, 6 R. 1208.

⁵ *Aitchison v. Hopkirk and others*, February 14, 1775, M. 15060; *Lord Blantyre v. Dunn*, July 1, 1858, 20 D. 1188.

⁶ *M'Laren and others v. Burns* (*supra*).

⁷ *Stewart v. Bulloch*, January 14, 1881, 8 R. 381. Under the Sporting Lands Rating (Scotland) Act, 1886 (49 Vict. c. 15), the annual value of unlet shootings and deer forests is now entered in the Valuation Roll.

their permanent way, it has been laid down as an equitable method of computing the annual value as a basis for the ascertainment of the composition, that the capital value be taken as the price paid for it, not including severance damages, or the extra price reckoned for compulsory sale, plus the expense of constructing the part line of the line in question, and that 4 per cent. on that capital value be regarded as the rental.¹ Where part of the feu consists of salmon fishings or lands let yearly in grass, the average rent for seven years represents the annual value.²

Questions as to fixtures sometimes arise between superior and vassal in computing the amount of the composition, and it has been decided that the rule for determining what are fixtures for the purpose of ascertaining the annual value of the subjects, is that applicable to cases between landlord and tenant:³ this rule being that which is most adverse to the idea of moveable objects being *fictione juris* part of the heritable subject.

Where the vassal sub-feus for an adequate duty, it is well settled that the measure of the composition payable by him to the superior is the amount of the sub-feu-duty, and not the annual value of the lands; and where the consideration of the sub-feu is not only a sub-feu-duty—whether partly adequate or wholly elusory—but also a price or grassum, the composition consists of the sub-feu-duty, plus the legal interest of the grassum for one year.⁴

Certain deductions fall to be made from the gross rental in the ascertainment of the composition, and the nature of these has thus been indicated;—"Feu-duties and all public burdens, and "likewise all annual burdens imposed on the lands by consent of "the superior, with all reasonable annual repairs to houses and "other perishable subjects."⁵ Where the superior is not pro-

¹ *Hill v. Caledonian Railway Company*, Dec. 21, 1877, 5 R. 386.

² *Bell's Conveyancing*, p. 1137.

³ *Marshall's Trustees v. Tannock Chemical Company*, July 2, 1886, 13 R. 1042. This was a case where the vassal had a chemical work erected on the feu, and it was held that the machinery was moveable in a question with the superior.

⁴ *Cowan*, March 29, 1636, M. 15055; *Cockburn Ross v. Governors of Heriot's Hospital*, June 6, 1815, Fac. Coll. 6. Paton's App. 640; *Campbell*, June 28, 1832, 10 S. 734. The question remains undecided as to whether the composition payable by the prime vassal to the overlord, falls to be augmented by any casualties received from the sub-vassal during the year in which such composition is exigible.

⁵ *Aitchison v. Hopkirk and others* (*supra*.)

prietor of the teinds, a fifth of the teindable rental (*i.e.* the agricultural value of the lands unenhanced by buildings), is deducted, whether the teinds have been valued or not, and this includes all deduction on account of minister's stipend.¹

Two points of considerable practical importance, though bearing more on the legal relations subsisting between the seller and purchaser of lands, than on those between superior and vassal, may here be noticed, since they have arisen in consequence of the great change operated on the law of casualties by the Act of 1874. Previous to the passing of that Statute, it was well settled that when a seller of land was not entered with the superior at the date of sale, the purchaser could compel him to enter and pay the appropriate casualty before the contract of sale was implemented, unless he had bargained otherwise.² Shortly after the Act came into operation, it was held that, where at the date of the sale the seller was impliedly entered by force of the statute, but a casualty was due to the superior, the former could not compel performance of the contract until he paid the casualty.³ It was not open for the seller to say to the purchaser that, because of the implied entry, the title which he tendered was complete notwithstanding the non-payment of the casualty. The unpaid casualty was an encumbrance which the seller was bound to clear off unless it was expressly stipulated to the contrary. A somewhat similar question arose in another case after the contract of sale was implemented.⁴ At the time of the sale the seller was impliedly entered by his infestment, but a casualty of composition was exigible by the superior, who had, however, made no demand for it. The purchaser did not insist upon the seller paying the casualty, but accepted his disposition and took infest-

¹ *Thomson v. Simson*, Nov. 24, 1825, 4 S. 224.

² *Gardiner v. Henderson*, March 7, 1799, M. 15037. Menzies' Conveyancing, p. 883. Bell's Conveyancing, p. 684; see also opinions of judges in *Straiton Estate Company v. Stephens (supra)*.

³ *Lawrie & Scott v. Scott*, decided by Lord Rutherford Clark, Nov. 15, 1876, and reported 8 R. 305.

⁴ *Straiton Estate Company v. Stephens (supra)*, decided by Second Division and four consulted judges. This case overrules a decision by Lord Curriehill in *The Leith Heritage Company v. The Edinburgh and Leith Glass Company*, June 8, 1876, 13 S.L.R. 731; see his Lordship's observations thereon in *Stewart v. Murdoch & Rodger (supra)*.

ment on it. The disposition contained a clause binding the seller to free and relieve the purchaser of all feu-duties, casualties, and public burdens payable or prestable to the superior prior to the date of entry. After the purchaser was so infeft, the superior raised an action against him for the composition, and obtained decree. The purchaser intimated the action to the seller, and then sued him for the composition and the expenses of process. The Court held that the composition being exigible by the superior prior to the date of the sale, fell within the clause of relief in the disposition, and that accordingly, the seller was bound to relieve the purchaser, both of the amount of the composition, and of the expenses which he had incurred in defending the action.¹

In order to complete our survey of the relationship of superior and vassal, that aspect of it dependent more or less on the principles of pure contract has still to be considered. Under the feudal system the superior's interest, the *dominium directum*, was paramount. It was not only of greater dignity than the vassal's, involving higher rank in the feudal society, but it was really the substantial estate upon which the vassal's interest, the *dominium utile*, rested, as a mere burden liable to the risk of being swept off altogether on many different contingencies. When the tenure of feu-farm came to be engrafted on the feudal system it reflected a good many of the features of the parent system, and there accordingly sprang up a tendency to regard the vassal's interest in the lands as subordinate to that of the superior, not merely in point of dignity, but in respect of the substantial estate. This tendency has been undergoing a modification since the 16th century, and more rapidly and visibly since the extinction of the feudal system 150 years ago. The modern spirit which has gradually changed the complexion of the law

¹ In that case there was an express obligation on the part of the seller to relieve the purchaser; but it is still an open question whether, in the absence of such express contract, the seller is bound, after the purchaser has accepted his disposition and taken infeftment, to relieve him of casualties which were exigible prior to his entry. The Lord Justice-Clerk expressed an opinion that, in such circumstances, the seller would not be bound to relieve the purchaser; but, on the other hand, Lord Young expressed very strongly a contrary opinion; holding that if there is no express bargain either way, the common law obligation of the seller is to pay all casualties which were exigible prior to the purchaser's entry, and that this obligation, which is merely pecuniary, subsists until it is fulfilled by payment, and is not discharged by the purchaser accepting and recording the disposition.

respecting landed property has, together with recent legislation, done much to make the vassal's estate the real and substantial element in the tenure. Still, the superior retains a substantial interest in the estate, and it is incorrect to say that he has been reduced to the position of a mere holder of a burden or security over the vassal's estate.¹

One of the most important effects of the Act of 1874, on the relationship of superior and vassal, is that whereby it is reduced to one dependent practically on contract. In the case of feus created after the commencement of the Act the annual feu-duty must be of fixed amount or quantity, and no casualties or duties are, by law and irrespective of express stipulation, exigible by the superior; and parties are prohibited from entering into contracts for the payment of casualties on the succession of an heir or the acquisition of a singular successor, or in any way, except at fixed intervals. It is lawful, however, to stipulate for a permanent increase or reduction of the feu-duty, or for payment of a casualty in the form of a periodical fixed sum or quantity, provided the amount is certain and the time at which it emerges is not dependent on any event, except the recurrence of the period.² There is, therefore, an essential distinction between the relationship of superior and vassal as it was created prior to 1874, and as it has been created since. Before 1874 certain obligations existed irrespective of express contract. They arose out of the relationship of superior and vassal, and were part and parcel of the tenure of feu-farm, and required to be expressly renounced in order to relieve the vassal of their performance. The Act of 1874 did not put an end to these implied obligations in the case of old feus; but where the relationship of superior and vassal has been established since the commencement of the statute, an express contract is required in order to the existence of such obligations. In a new feu no duty is incumbent on the vassal in respect of the tenure or arising out of his relationship with the superior apart from special stipulation.³ The relationship is now essentially a con-

¹ See dictum of Lord-President Inglis in *Sandeman v. Scottish Property Investment Company*, 8 R. 794.

² Section 23.

³ Probably the only latent liability of the vassal in new feus is that involved in the irritancy *ob non solutum canonem*, which is implied in every contract of feu, new as well as old, by virtue of the statute 1597, c. 250.

tractual one, and the questions which arise are more or less determined on the principles affecting contracts in general.

In connection with this aspect of the feudal relationship, the view which at once presents itself is that the contract is designed to be perpetual. Certain elements in it may have only a temporary operation; but the cardinal features of the relationship, with its dependent rights and obligations, remain after the original contracting parties have either ceased to exist or become disconnected with the tenure. It will thus be seen that it may come to be of essential importance to inquire what provisions in a given contract of feu are temporary and intended only to bind the original contracting parties, and what provisions are to be permanently operative and to bind all who may come to occupy the position of superior and vassal. Here we touch the important principle whereby those provisions in charters or feu contracts, called *inherent conditions of the feu-right*, or otherwise *conditions of the tenure*, and, as such, operative between the persons concerned in the tenure, though not parties to the original contract, are logically separable from other provisions and obligations which, not being inherent elements of the tenure, are not so enforceable. So long as the original parties to the feu contract or their personal representatives remain the owners of the separate estates of superiority and property the provisions of the contract can be enforced, as personal obligations, in the same manner as if the transaction did not relate to the tenure of land. But when the vassal alienates the feu the questions arise, how far can provisions in the contract or charter be enforced against a singular successor, and, if such provisions do bind the singular successor, are they of the nature of *personal obligations* to be enforced by personal actions, or are they only *real burdens* enforceable by poinding of the ground and the other modes of real diligence? In order to answer these questions it must be determined whether the provisions—assuming the singular successor has not expressly interposed his personal obligation for their fulfilment—are of the nature of inherent conditions of the tenure, or whether they are burdens merely affecting the lands without entering into the tenure as an inherent condition, or, otherwise, whether they import any obligation on the singular successor. If the particular provision is not an inherent condition of the tenure, nor

a real burden, it imports no obligation on the singular successor, and cannot be enforced either against him personally or against the lands by real diligence, though the original vassal and his personal representatives may remain liable. Should the singular successor by express stipulation adopt the obligation as his own at the time he acquires the lands or subsequently, it can, of course, be enforced against him, like an ordinary personal obligation. An inherent condition of the feu-right thus combines the elements of a personal obligation and a real burden. By means of it the superior can proceed by personal action against singular successors and sub-vassals. The legal theory whereby such conditions can be enforced against persons, not expressly made parties to the original covenant, is, that by becoming the owners of the land they enter into feudal relationship with the superior, and there is, *ipso facto*, established between him and them a *privity of contract*. The fact of feudal ownership has brought them into the contract and made them liable to fulfil its conditions. It is by virtue of the same inherent quality of the condition that it can be enforced by real diligence directed against the lands without fulfilling the requisites of a real burden. A real burden is an obligation which does not affect the person owning the land, but attaches to the land itself, and only affects the owner indirectly, inasmuch as the land is liable for its fulfilment. As a consequence it can only be enforced by real diligence. It cannot be made the subject of a personal action directed against the individual. The requisites of a real burden have been well established,¹ and are as follows:—(1) Words must be used which clearly express or plainly imply that the subject itself is to be affected, and not the grantee or his heirs alone. (2) These words must be inserted in the infeftment and appear on the record. (3) The burden must not be contrary to law or inconsistent with the nature of the particular species of property conveyed. (4) The burden or condition must not be useless or vexatious or contrary to public policy. (5) The person enforcing it must have an interest to do so. If these qualities are present it is not necessary that the obligation should be declared in so many words to be real or a *debitum fundi*, or that it shall be inserted in all future infeftments or fenced with

¹ *Tailors of Aberdeen v. Coutts*, Dec, 20, 1834, 13 S. 226 ; 1 Rob. App. 296.

irritant clauses. If the condition is one usually attaching to land or is of a continuous nature, which cannot be performed by an act of the disponent or his heir, words less clear and specific will suffice to create it than when it appears to be of a personal nature. A real burden may be created as between a superior and vassal or as between a disponent and disponent.

On the other hand, an inherent condition of the tenure can only exist where the relationship of superior and vassal has been established; because it is a burden or obligation that has been made a condition upon which the feu-right has been granted or is held. But every burden which is imposed on the vassal by the feu-contract and called a "condition" is not necessarily an inherent condition of the tenure. "In order that the obligation may be binding as a condition of the feudal grant or contract, it is not enough that it is called a condition. It must fulfil the logical requisites of a condition of such a contract—that is, it must have some relation to the necessary or natural incidents of a grant of land." It must be "such a condition as will run with the lands."¹ Otherwise stated, an inherent condition of the tenure must "constitute an integral part of the feudal grant," and not merely be "a collateral personal contract."²

The best example of an inherent condition of the feu-right is the obligation to pay the stipulated feu-duty. As has been seen, not only is the singular successor in the feu personally liable to fulfil this obligation, but it can be enforced against the lands by real diligence. It is not necessary that he adjust his personal obligation *ex post facto*, or that the stipulated payment be constituted a real burden in order that the superior have his twofold remedy. In like manner it is by virtue of the inherent quality of the condition that the sub-vassal is personally liable to pay the whole of the original feu-duty where he possesses the entire feu, the feu-duty stipulated in his own charter where such is a fair equivalent of the part of the original feu held by him, or a proportional share of the feu-duty where he holds a part of the original feu for a nominal duty or for less than a fair equivalent. In all these cases the feu-duty for which the sub-vassal is liable is regarded as an inherent condition of his tenure

¹ Per Lord M'Laren in *Mags. of Edinburgh v. Begg*, Dec. 20, 1883, 11 R. 352.

² Per Lord Justice-Clerk Moncrieff in *Morrison's Trustees v. Webster*, May 16, 1878, 5 R. 813.

which he is personally bound to fulfil to the over-superior, who has also the real security of the lands themselves.¹

A proper casualty of superiority, such as the relief duty of an heir, is another example of an inherent condition of the feu-right, so as to be enforceable either personally against the vassal or by means of real diligence against the lands. The question whether composition—which, until the Act of 1874, was not universally recognised by feudalists as a proper casualty²—is also to be reckoned as an inherent condition arose in two recent cases.³ In both the composition was taxed and expressly stipulated in the reddendo of the charter. It was held, though not without some dissent,⁴ that the composition was a *debitum fundi* in respect of being one of the reserved rights of the superior, and might be recovered by a pointing of the ground; and also that it must be paid preferably to the claim of a creditor in an ordinary real burden carrying through real diligence. A doubt, however, was expressed as to how far an untaxed composition, or one only due *ex lege*, could be made the subject of real diligence.⁵

It is not necessary that the obligation undertaken by the vassal should be a pecuniary one in order to its being an inherent condition of the feu-right. An obligation to erect buildings on the feu within a specified time—a very common kind of burden imposed on the vassal—is one which inheres in the tenure so as to bind singular successors. Such obligations may not fulfil the requisites of real burdens, nor indeed be capable of being made such; but in virtue of their character as inherent conditions of the tenure, they can be enforced by direct action, as if for implement of a personal obligation, or by real diligence as in the case of a real burden. Such an obligation must be taken up by the singular successor “when it passes from the original feuar “because it is not merely personal but runs with the lands, and

¹ *Marquis of Tweeddale's Trustees v. Earl of Haddington* (*supra*).

² The controversy on this point may be examined in the following cases:—*Lockhart v. Denham*, M. 15027; *Cockburn Ross v. Heriot's Hospital* (*supra*); *Stirling v. Ewart*, 4 D. 684, 3 Bell's App. 128, commented on in *Morrison's Trustees v. Webster* (*supra*).

³ *Morrison v. Webster* (*supra*); *Stewart v. Gibson's Trustee*, Dec. 10, 1880, 8 R. 270.

⁴ Lord Ormidale dissented in *Morrison's Trustees v. Webster*.

⁵ Per Lord-President Inglis in *Stewart v. Gibson's Trustee*.

“it is of such a nature that singular successors are bound to fulfil it, although it is not possible to make it a real burden.”¹

Inherent conditions of the tenure may not only be positive obligations undertaken by the vassal, but may consist of restrictions on his liberty of dealing with the property. They may take the form of provisions designed to affect the structural character of the buildings on the feu, such as prohibitions against erecting buildings other than those of a certain elevation, or according to a certain plan; or they may consist of conditions as to the particular use to which the buildings may be put, such as prohibitions against specified trades, or definite operations supposed to be of an objectionable character.²

A good example of a provision which was of such a nature as not to be an inherent condition, and which was also incapable of being made a real burden, occurred in a recent case.³ The feu charter contained a stipulation that the feuar should be bound, on the superior completing a roadway, to pay a proportion of the expense. The roadway was completed and the expense ascertained before the feu passed into the hands of the singular successor; but no demand was made by the superior for payment of the amount until it was claimed from the singular successor. A personal action was raised against him; but it was held that the provision imported no obligation against a singular successor, inasmuch as it was not an obligation which ran with the lands, but one which was intended to affect the original feuar and him alone. A clear distinction was drawn between

¹ Per Lord President Inglis in *Magistrates of Glasgow v. Hay*, Feb. 23, 1883, 10 R. 635.

² *Tailors of Aberdeen v. Coutts (supra)*; *Campbell v. Clydesdale Banking Company*, June 19, 1868, 6 Macph. 943; *Ewing v. Campbells*, Nov. 23, 1877, 5 R. 230; *Ewing v. Hastie*, Jan. 12, 1878, 5 R. 439; *Anderson v. Aberdeen Agricultural Hall Company*, May 16, 1879, 6 R. 901; *M'Ewan v. Stewart*, March 10, 1880, 7 R. 682; *Moir's Trustees v. M'Ewan*, July 15, 1880, 7 R. 1141; *Earl of Zetland v. Hislop*, March 18, 1881, 8 R. 675, H.L. June 12, 1882, 9 R. H.L. 40; *Cowan v. Magistrates of Edinburgh*, March 19, 1887, 14 R. 682. In *The Earl of Zetland v. Hislop*, the prohibition was against the buildings on the feu being used for the sale of excisable liquors without the written consent of the superior, and it was held by the House of Lords, reversing the judgment of the Second Division, that such a prohibition was an inherent condition of the feu, and passed on to singular successors. The opinions of Lord Chancellor Selborne and Lord Watson in that case throw much light on the legal principles affecting the restrictive conditions of feu-rights.

³ *Magistrates of Edinburgh v. Begg*, Dec. 20, 1883, 11 R. 352.

such a provision and others contained in the charter, to the effect that the vassal and his successors were to uphold and maintain the roadway and drains in all time coming, which were manifestly obligations of such a nature as to run with the lands, and therefore to become inherent conditions of the grant.

Questions have not infrequently arisen as to the meaning and effect of particular burdens inherent in the tenure. The presumption is in favour of the free and unrestricted use of property. "Restrictions are not to be imposed unless they are distinctly expressed, or are matter of necessary and direct inference from the terms used."¹ At the same time, "though restrictions on property are not to receive a loose or wide interpretation as against the proprietor, still they are to receive a fair and not a malignant interpretation as against the superior."² In accordance with these principles, a vassal restricted in his erection of buildings on the feu to houses of "three square storeys in height" was permitted to have attics in the roof with storm windows.³ A provision in a feu-charter bound the vassal to erect within a specified time, and maintain on the feu, buildings of a certain value and architectural character with a foot pavement of certain dimensions; but he was not expressly restrained from erecting additional buildings of a different character, and he was held entitled to do so.⁴ A prohibition against the erection of any buildings except dwelling-houses, and against any "public-house or tavern," was held to exclude effectually the vassal's right to build a hotel or a hydropathic establishment.⁵ The expression "private dwelling-house" was held as excluding a "girls' school."⁶ Where the feu-charter prohibited the vassal from carrying on "anything which may be a nuisance or may occasion disturbance to any of the neighbouring feuars or proprietors," it was held that in erecting on the feu a hall for the exhibition and sale of cattle he did not contravene the prohibition, as the amount of inconvenience proved was inconsiderable, and the neighbour-

¹ Lord Shand in *Ewing v. Campbells* (*supra*).

² Lord President Inglis, *ibid*.

³ *M'Ewan v. Stewart* (*supra*). See also *Moir's Trustees v. M'Ewan* (*supra*).

⁴ *Cowan v. Magistrates of Edinburgh* (*supra*).

⁵ *Ewing v. Campbell* (*supra*).

⁶ *Ewing v. Hastie* (*supra*).

hood was already a great centre of the cattle trade.¹ Where the condition specifies the character of the houses to be built on the feu as "single," "self-contained," "detached," &c., the tendency of the decisions is in favour of the vassal's liberty in his use of the building, so long as it is structurally consistent with the prescribed character.² An obligation imposed on the vassal to pay half the cost of maintaining a sewer cannot be extended so as to cover the expense of constructing it.³

We have seen that provisions expressed in contracts of feu which are of the nature of inherent conditions of the tenure effectually run with the lands, and are enforceable against singular successors by personal action, and—so far as they are capable of such enforcement—by real diligence, without the interposition of the successor's personal undertaking, and without requiring to constitute the provisions real burdens. Still less do such inherent conditions need to be fenced by irritancies. Sometimes, however, this remedy is added by express stipulation, and in that case the superior is entitled, after contravention, to annul the vassal's right as if it had never been granted. The irritancy is, of course, only conventional—that is to say, there is not, as in the case of feu-duties, a legal or statutory irritancy which attaches to the feu-right independently of express stipulation in the charter. When there is such a stipulation, the effect of it is that, when the obligation is unfulfilled, the superior, by means of a declarator, cuts down the feu-right and all that has followed on it, and it is thereafter of no force or effect, just as absolutely as when cut down by virtue of the irritancy *ob non solutum*

¹ *Anderson v. Aberdeen Agricultural Hall Company (supra)*. See also *Manson v. Forrest*, June 14, 1887, 14 R. 802.

² *Fraser v. Downie*, June 22, 1877, 4 R. 942; *Moir's Trustees v. M'Ewan (supra)*; *Buchanan v. Marr*, June 7, 1883, 10 R. 936; *Miller v. Carmichael*, July 19, 1888, 15 R. 591.

³ *Stewart v. Meikle*, Jan. 27, 1874, 1 R. 408. The principles regulating the inherent condition of feu-rights do not apply to obligations contained in a contract of ground annual. The relationship created by the contract is not that of superior and vassal, but of seller and purchaser; and accordingly, a personal obligation to pay the ground annual does not transmit against singular successors, and, in order to be effectual after the lands are alienated, must be constituted a real burden. *Gardyne v. Royal Bank of Scotland*, March 8, 1851, 13 D. 912, rev. H.L. May 13, 1853, 1 Macq. 358; *Marshall's Trustee v. MacNeill & Co.*, June 19, 1888, 15 R. 762.

canonem. In a case already cited,¹ a feu right was cut down from failure to erect buildings on the feu timeously where there was a conventional irritancy.

The inherent condition may be of such a nature as to be capable of running with the lands, and of validly affecting the feu, and at the same time the superior may not be *in titulo* to enforce it. His right of enforcement may be lost by acquiescence in contraventions, or it may have been defeated by his never having had sufficient interest to enforce it, or by such interest having ceased to exist. The degree and character of the acquiescence necessary to preclude the superior from enforcing an otherwise effectual condition depend upon ordinary principles of law, and upon the circumstances attending the supposed relinquishment of the right.² A special development of the principle as it affects conditions in feu rights is seen in the rule whereby a superior who imposes similar restrictions on a number of vassals loses his right to enforce them against one vassal by acquiescing in continuous and systematic contraventions on the part of one or more of the co-vassals.³ But a single relaxation to a limited extent of a provision in a feu contract will not cancel the restrictions applicable to the remaining feus given off by the same superior.⁴

The interest which the superior requires to have in order to entitle him to enforce the conditions must be a sufficient patrimonial one. He must not merely be attempting to put in force

¹ *Magistrates of Glasgow v. Hay (supra)*. In *Welsh v. Jack*, Nov. 7, 1882, 10 R. 113, separate pieces of ground were feued in one contract, and separate obligations fenced by an irritancy were imposed on the vassal to erect certain buildings on both. It was held that the irritancy did not affect the right of a singular successor in one of the pieces of ground, though incurred with regard to the other, which remained the property of the original vassal.

² *Earl of Zetland v. Hislop (supra)*. For the general principles of the law regarding acquiescence see Rankine's "Law of Land Ownership," p. 329, and their bearing on building restrictions in feu rights, *ib.* p. 396.

³ *Brown v. Burns*, May 14, 1823, 2 S. 298; *Campbell v. Clydesdale Banking Coy. (supra)*; Lord Watson in *Earl of Zetland v. Hislop (supra)*. See also *Dalrymple v. Herdman*, June 5, 1878, 5 R. 847.

⁴ See dictum of Lord President Inglis in *Ewing v. Campbells (supra)*. Here the vassal had conveyed a part of the feu to a singular successor, who obtained from the superior a relaxation of a particular restriction, but this was not held as precluding the superior from enforcing the restriction against the vassal in regard to the portion of the feu retained by him.

an obligation from the fulfilment of which he is to derive no benefit.¹

It is not, however, incumbent on the superior to aver or establish such an interest as the law will recognise: it is for the vassal who seeks on that ground to escape from complying with an explicit provision in the contract to show that the superior has lost any interest which he may have had originally. An action by the superior is not irrelevant because it does not allege an interest to enforce the restricted condition. "*Prima facie*, the vassal, in consenting to be bound by the restriction, "concedes the interest of the superior, and therefore the onus is "upon the vassal who is pleading a release from his contract to "allege and prove that, owing to some change of circumstances, "any legitimate interest which the superior may originally have "had in maintaining the restriction has ceased to exist."²

An important development of the principles we have been considering occurs when each of a number of co-feuars holding under the same superior acquires the right of enforcing for his own benefit restrictions affecting the feus belonging to the others. Such a right may be acquired expressly or by implication. Thus, a superior, in granting a series of feu rights, may expressly stipulate in each contract that the restriction affecting every feu will be enforceable by the others, or the co-feuars may mutually agree to a like effect. When these stipulations distinctly and in express terms confer the right of enforcement, a co-feuar has as little difficulty in compelling fulfilment as the superior himself, though he is subject to the same condition as to possessing a legitimate interest. When no express right of enforcement is created, it often comes to be a matter of some difficulty whether the feu contracts are in such terms as to give

¹ *Tailors of Aberdeen v. Coutts* (*supra*); *Naismith v. Cairnduff*, June 21, 1876, 3 R. 863; *Earl of Zetland v. Hislop* (*supra*).

² Per Lord Watson in *Earl of Zetland v. Hislop* (*supra*). In this case the Court of Session (Second Division), whose judgment was reversed, had held that the only interest the superior could have in enforcing a restriction against the sale of spirituous liquors on the land feued, upon which a town had been built, was to secure the wellbeing of the community, and that this was not such an interest as the law would recognise. The House of Lords, however, held that the superior "disclosed a very plain case of patrimonial interest" in his "specific allegations "of detriment to the value of his house property and of his land, both feued and "unfeued, as well as to the comfort and amenity of his mansion-house and "policies." (See opinion of Lord Watson.)

a co-feuar the right by implication, though the general principles of the law have recently received authoritative exposition.¹ In order that this right of enforcement or *jus quæsitum* may be implied from the several contracts, the following elements must exist:—(1) The conditions to be enforced must appear in all the feu rights; (2) these conditions must be similar, if not identical; (3) the feuar seeking to exercise the right must have a legitimate interest to do so; and (4) there must be such a mutuality of interest among the feuars in the enforcement of the conditions as to justify the inference that each had in view the creation of a *jus quæsitum* in favour of his neighbours, and had consented to it. This mutuality of interest is inferred when the superior expressly stipulates in each contract that he will insert the conditions in the others, or when the various feus are given off in accordance with a uniform plan or scheme. The rights of the superior and of the co-feuar to enforce the conditions are independent and separate. “The title of the superior rests upon contract; . . . the right of the feuar, though arising *ex contractu*, is of the nature of a proper servitude, his feu being the dominant tenement. . . . The superior’s consent to discharge the condition cannot affect the right of the feuar, and as little can the feuar’s renunciation of his servitude impair the superior’s right to enforce the condition.”² The *jus quæsitum* of the co-feuar does not rest on any implied assignation by the superior (which would have the effect of divesting the latter of his right of enforcement), but upon an inferred consent of the co-feuar “to be bound by the law laid down by the common author for the benefit of all future feuars.”³ In a case more recent than the one just cited,⁴ and containing specialties, a decision was given adverse to the existence of a right of enforcement in a co-feuar where a part of a feu originally given off to one person had been resigned into the hands of the superior and re-feued by him under conditions essentially different from those appearing in the original contract.

¹ *Hislop v. MacRitchie’s Trustees*, Dec. 17, 1879, 7 R. 384; *rev.* June 23, 1881, 8 R. H.L. 95. The judgment of Lord Watson is particularly instructive on the whole question. The earlier cases are all cited and commented on.

² Per Lord Watson in *Hislop v. MacRitchie’s Trustees* (*supra*).

³ *Ibid.*

⁴ *Calder v. Merchant Company of Edinburgh*, Feb. 26, 1886, 13 R. 623. See also *Walker & Dick v. Park*, Feb. 29, 1888, 15 R. 477.

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